Supreme Court, U.S.
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No.

In The Supreme Court of the United States

October Term, 1996

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE COURT SHOULD ADOPT A BRIGHT-LINE RULE DISQUALIFYING A TRIAL JUDGE FROM PASSING UPON THE FAIRNESS OF A CLASS ACTION SETTLEMENT WHERE THAT JUDGE HAS BEEN INVOLVED IN THE UNDERLYING SETTLEMENT NEGOTIATIONS?

II.

WHETHER A CLASS ACTION IS PROPERLY CERTIFIED AS A MANDATORY, NON-OPT-OUT PROCEEDING WHERE THAT PROCEEDING SEEKS TO RESOLVE TORT CLAIMS FOR DAMAGES?

PARTIES TO THE PROCEEDING

THE PETITIONERS: Petitioners Flanagan and Middleton are merchant seaman who were exposed to Fibreboard's asbestos-containing products during their sailing careers. They objected to the Global Settlement Agreement and were granted leave to intervene in the proceedings. In the underlying proceedings they were sometimes referred to as the "Maritime Claimants" or "Maritime Intervenors".

THE RESPONDENTS: The caption under which this Petition is filed lists the other parties to the underlying *Ahearn* v. *Fibreboard* litigation out of which this Petition arises.

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REPORTED OPINIONS AND ORDERS

The non-opt-out, Global Settlement Agreement being challenged was approved by the district court in *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505 (E.D. Tex. 1995) (dated July 27, 1995) [A-135].

A divided panel of the Fifth Circuit Court of Appeals affirmed the trial court *sub nom. In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) [A-4].[1]

Rehearing *en banc* was denied, *In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996) (November 26, 1996) [A-1]. Rehearing by the original panel was denied without comment, *In re Asbestos Litigation*, 1996 U.S. App. LEXIS 33548 (5th Cir., December 3, 1996) (unpublished) [A-187].

These decisions are included in the separately-bound Appendix to this Petition at the indicated pages.

STATEMENT OF JURISDICTION

A. Jurisdiction In This Court Of Last Resort

Pursuant to Rule 14(e), Petitioners state that jurisdiction lies with this Court by virtue of the following:

(i) date that judgment or order sought to be reviewed was entered:

The court of appeals issued its slip opinion on July 26, 1996 (*In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996) [A-4].

(ii) Date of orders respecting rehearing:

The court of appeals entered judgment denying rehearing *en banc* on November 26, 1996 [A-1]. The original panel denied rehearing on December 3, 1996 [A-187].

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[1] **References herein to the Fifth Circuit's decision will be in the style of "Maj., 90 F.3d at ___", or "Dissent, 90 F.3d at ___", followed by reference to the separately-bound Appendix hereto "[A-___]".**

This petition is thus timely in that it is filed with Clerk within 90 days after the denial of rehearing by the court of appeals. *See* Rule 13.3.

(iii) Not applicable.

(iv) statutory provision believed to confer on the Court jurisdiction to review on a writ of certiorari the judgment or order in question:

28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree[.]

Petitioners Flanagan and Middleton became parties to the underlying civil case of *Ahearn* v. *Fibreboard* via order dated June 28, 1994, granting them leave to intervene.

(v) Not applicable.

B. Jurisdiction In The District Court

The Class Action Complaint filed in the district court alleged subject-matter jurisdiction under 28 U.S.C. § 1332 (diversity of citizenship).

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES PRIMARILY RELIED UPON

The following provisions primarily relied upon are set forth in full in the Appendix:

Fed. R. Civ. P. 23 [A-224–A-227]
28 U.S.C. § 455 [A-221–A-223]

PREFACE

The need to rectify occurs when breakdown results. It is a legal breakdown that is the tragedy of the majority opinion by

the court below. The quest for correction is the linchpin of American jurisprudence.

The sole dissenter of this case below stated astutely, "[T]his case is an affront to the integrity of the judicial system." Dissent, 90 F.3d at 994 [A-61]. The integrity of our standard of justice in the United States is often tested. Inherent if not inalienable personal rights form the cornerstone of American citizenry. The right of redress within the code of uniformity is a mainstay ingredient of that cornerstone. This case does not test out because it corrodes that cornerstone by the fostering of judicial legislation. No case of greater magnitude, no case of higher profile; no case of greater forfeiture has ever been conjured.

Now provided is an opportunity for this Court to address the issues of the case as those issues impact upon constitutional guarantees of due process as well as the maintaining of the judicial process that has come to be heralded throughout the world in standing for rights under the law. As it now stands, this is an abominable case that blows like an ill wind of gale force extinguishing the light of freedom that is flamed by the mighty power of the Bill of Rights, the Constitution and the Magna Carta. The right to opt out of a class action for settlement of damages was beyond the reach of challenge before this case was brewed. In the wake of this case, those very rights become flotsam, jetsam and lagan, cast off into the relentless sea of no return.

The right to a fair and impartial adjudication of all issues that underpin a judicial hearing is undeniably fundamental to our judicial system. Yet that very concept is eroded by the opinion below. The key to unlock this travesty indeed is certiorari.

STATEMENT OF THE CASE

A. Fibreboard Corporation — The Tortfeasor

Fibreboard Corporation was a manufacturer of asbestos products. Its asbestos products went into the market from 1920 until 1971. 90 F.3d at 968 [A-5].

Fibreboard was first sued in 1967 for an asbestos-related liability. Like other companies faced with enormous asbestos-related liabilities, Fibreboard looked to its insurers to pick up the tab. Those insurers included Continental Casualty Company and Pacific Indemnity Company.

Disputes concerning the insurers' liability to Fibreboard under the relevant insurance policies resulted in litigation initiated in the California Superior Court in 1979. Fibreboard prevailed in the California trial court.

B. Global Negotiations

Hopeful of getting out of the asbestos-litigation business for good, in 1990 Fibreboard commenced negotiations with a hand-picked group of plaintiff's attorneys.

Fibreboard and the plaintiffs' "counsel without portfolio" came close to agreement in November 1991 on a global settlement. That unconsummated deal would have been structured as an opt-out settlement.

Fibreboard tried to jump start the negotiations again in early 1992, still talking in terms of an opt-out.

C. The Assignment Settlements

Fibreboard, short of ready cash but potentially rich in insurance coverage, in late 1990 embarked on a program of settling asbestos claims with plaintiffs' attorneys utilizing the unusual currency of assignments of Fibreboard's rights to coverage under its insurance policies.

The assignment settlements were most generous in the dollar amounts they purported to grant to injured asbestos claimants. Continental objected to all such settlements, taking the position that Fibreboard was essentially "giving away the store", using Continental's money.

D. The Assignment Litigation In Tyler

On January 11, 1993, Fibreboard filed a Complaint for Declaratory Relief against Continental Casualty Co. in the Eastern District of Texas, seeking to validate the propriety of its assignment

settlements. Another action captioned *Continental Casualty Company* v. *Pacific Indemnity Company and Fibreboard Corporation*, Civil Action No. 6:93 CV 223 (E.D. Texas) was filed on April 13, 1993. The latter case was subsequently consolidated with the former, the resulting litigation being captioned under No. 6:93 CV 11. The parties before the district court in the Assignment Litigation were, then, Fibreboard and the two insurance companies, Pacific and Continental. There were no "plaintiffs" or "claimants" before the Court who had been injured by exposure to Fibreboard's asbestos products.

E. Continental Gets Involved — The April 9 Agreement

In early 1993 Continental, jittery over its abysmal track record in the Coverage Case in California, and fearful of an adverse result in the Assignment Litigation pending in Texas, sought to buy its way out of liability for Fibreboard's asbestos-related torts.

On April 9, 1993, Fibreboard and Continental entered into an agreement by which, among other things, Fibreboard gave up its right to negotiate separately with plaintiffs, and by which both parties made a commitment to use their best efforts to effect a global settlement of their respective asbestos-related liabilities.

F. Not The Parties But The Judiciary Scripted The Scenario For The Class-Action Drama

In early 1993, the Assignment Litigation was pending before Judge Parker. The Court suggested the parties meet with Judge Higginbotham to discuss settlement. Several meetings were indeed held before Judge Higginbotham.

At this point, there were at least two important players in the game who were pushing for a non-opt-out settlement. Judge Parker had championed this approach during the meeting at Dolley Madison House in Washington.

Continental was quick to enlist Judge Parker as an ally. In writing to Judge Higginbotham on March 26, Mr. Wachtell, lead counsel for Continental, impugned a Fibreboard proposal that contemplated an "opt-out" class:

> It would call for an "opt-out" class, a structure which, by definition, cannot terminate ongoing litigation involving the parties and is contrary to ***Chief Judge Parker's emphatically stated view that a global settlement herein can and should be accomplished by means of a mandatory non-opt-out class.***

(Emphasis supplied.) In that same letter Mr. Wachtell amplified the assertion:

> . . . Chief Judge Parker informed the parties at a status conference before him on March 10, 1993, that he believes that a global settlement should and can be achieved by the use of a mandatory, "non-opt-out" class action under Fed. R. Civ. P. 23(b)(1)(B).

At no point in the proceedings did Judge Parker disclose the truth of this assertion. Neither would Judge Parker permit Mr. Wachtell to be deposed or called as a witness. Another attorney for Continental, Mr. Koplow, gave sworn testimony that Mr. Wachtell "would not have made it up."

The judiciary, and not the parties, made the crucial decisions concerning the Rule 23 class action no-opt-out structure of the settlement. It was Judge Parker who crafted the substance that framed the issue here. Judge Higginbotham faithfully followed the non-opt-out mandate. Initially, Judge Higginbotham got "very, very angry" with Messrs. Rice and Cox when they essentially refused to respond to the Continental position that it would not consider an opt-out deal.

The judiciary likewise decided that the settlement should be a "futures only" deal.[2] In July of 1993 Judge Higginbotham "made it clear" that a global settlement "ought to be addressed as a future-only global [settlement]". At a meeting in Dallas on or about July 13, 1993, (Koplow Dep. 203) Judge Higginbotham expressed a dual "view" that (1) global should be limited to future claims; (2) that the format should be a mandatory,

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[2] **This is substantiated by sworn testimony given in *Ahearn*. *See, e.g.*, Koplow Deposition 143, 203-206.**

non-opt-out class under Rule 23(b)(1)(B). It was Judge Higginbotham's "clearly expressed view" that the Ness Motley agreement should be the vehicle "to resolve as many of the present cases as possible." This was not the format Continental favored ("we preferred to have everything in one global").

The declaration that the global settlement should not include "present" cases was not Judge Higginbotham's alone. Rather, it appears that there was an ad hoc "shadow committee" of federal judges, acting behind-the-scenes to advance some agenda. As one of Continental's counsel testified[3]:

> I know what I recall Judge Higginbotham saying at the time that he articulated it, and that was that there had been a conversation or conversations by him with a number of other judges, and he had concluded that the appropriate way to move the discussions forward was to take the presents out of any contemplated global resolution.

Mr. Koplow could not recall whether the names of the other judges were mentioned or not.

It is thus undisputed that this controversial "structural issue" (Snyder, Tr. 12/12/94 at 323-324), was decided by the judiciary, and the product was "a futures action only", "*[a]s the Court had requested . . .*" (Emphasis supplied.) Transcript of 8/27/93 at Page 2 [A-193].

G. The Ness Motley Settlements

Before they would go forward with the global settlement upon which Continental and Fibreboard were so intent, counsel Rice and Cox insisted upon settling their entire office inventories, as well as the asbestos inventories of dozens of other affiliated law firms throughout the United States and Canada. The result was the so-called Ness Motley II[4] agreement approved by

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3 Koplow Deposition 74.

4 After April 9, 1993 it will be recalled that Fibreboard and Continental were negotiating directly with plaintiffs' attorneys. The so-called Ness Motley I agreement of December, 1992, which resolved some 20,000 cases, was between Fibreboard only and the Ness Motley plaintiffs.

Judge Parker on August 6, 1993, "a major step in putting all of this together." Ness Motley II settled in excess of 45,000 cases.

There were handsome sums in store for those favored claims which were selected to avoid the spectre of *Ahearn*. The average settlement under Ness Motley II amounts to $ 10-11,000 per case.

H. Appointment Of Class Counsel For A "Futures" Settlement

In disregard of the unavoidable fact that there was no "class" properly before him, on August 11, 1993 Judge Parker entered an Order captioned in the Assignment Litigation, reciting that on August 9 the firm of Ness, Motley, *et al.* had settled its inventory of asbestos cases against Fibreboard by an agreement between Ness, Motley, Fibreboard and Continental Casualty. The Order purported to officially "authorize" Messrs Rice, Cox, Kazan and Wartnick to negotiate "the prospect of a Rule 23 (b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

I. The August 26 Negotiations In Tyler

Between August 11 and 26, the parties continued their negotiations toward a non-opt- out global settlement. Judge Parker was actively involved.[5] The court was aware of "bid and ask" prices in negotiation; "he knew what the issues were between the parties".

On August 26 the parties came to Tyler for additional negotiations under Judge Parker's supervision. The negotiations commenced at the courthouse, but did not end there. As a continuation of negotiations in the Courthouse itself, Judge Parker directed that the discussions were to pause until all adjourned to the judge's house. Outside the courthouse counsel boarded vans arranged for by the Court and were taken to the Court's personal residence.

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[5] **Sworn testimony of counsel present substantiates the asserted facts. *See, e.g.*, testimony of class counsel (Wartnick Dep. 194-196, 213-14, Kazan Dep. 130, Koplow Dep. 310, 315).**

The Court essentially ordered a number of counsel to follow him without advising where they were going. Mr. Koplow "regarded it as simply another device to get some more money out of Continental." They arrived at the judge's home at 5:30 to 6:00 P.M., and left between 11:00 P.M. and midnight. Counsel were served hors d'oeuvres and beverages, some of which were alcoholic.

J. The Court Pressured The Parties During The Negotiations

Facts adduced from sworn testimony are to the effect that the expected conduct is that of a detached, impartial mediator. That was missing. The Court "pressured" and verbally "beat up on" the negotiators. Mr. Koplow testified that during the August 26, 1993 negotiations which commenced at the Courthouse, the Court

> proceeded to do his level best to get a resolution of the issue by pressuring people, mainly the insurers, to do better than the billion 5.

Koplow Dep. 305. Fibreboard was similarly "pressured" by the Court. Koplow Dep. 306-307.

The pressure continued after negotiations adjourned to the Court's residence. The Court employed "persuasive tones, imploring all parties not to be inflexible." Sweeney, Page 80. The tenor of the message the Court implored was that

> "this deal can't fail because of any one of the three of you."

Sweeney, Page 80. At the Court's home Koplow testified that the Court "engaged in sort of equal-opportunity beating on everybody"; "The judge made it clear a number of times that we ought to be able to settle the matter . . ."; The failure of the participants to reach a settlement was "of some amount of frustration to the court." Koplow Dep. 311-312.

The "pressure" being exerted was sufficiently strong that

> counsel for the insurers spent a fair amount of time on the judge's porch and out on the judge's

> front lawn avoiding being beaten up for additional dollars.

Koplow Dep. 316.

K. Global Settlement Announced: The August 27, 1993 "Awards Ceremony"

On August 27, 1993, a hearing was held in the Assignment Litigation to announce the global settlement reached at the judge's home. The transcript reads more like an awards ceremony or testimonial dinner for class counsel as well as the Court, rather than adversarial proceedings. Transcript of "Settlement Hearing" [A-192–A-212].

In the course of the oral presentation by counsel, the Court interrupted on several occasions to interpose questions or comments clearly illustrating its participation in and awareness of the substantive underlying negotiations. *See, e.g.*, Transcript Pages 7, 10 [A-198, A-199]. At Page 13 [A-200] the Court spontaneously commented that

> The element that I recall that I think has not been mentioned, ***in the unlikely event of failure to achieve Court approval*** and failure to achieve approval of the — well, or as part of the bilateral agreement, the relation of the funds to Fibreboard's benefit would include the interest.

(Emphasis added.)

A few moments later Mr. Wachtell rose to address the Court and made clear the collective sentiment in the courtroom that the "proposed" settlement was virtually a "done deal":

> And there is, as Your Honor had indicated a correlation between the — that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement *in what we all think is the unlikely* —

Page 16 [A-202] (emphasis supplied). At this point Mr. Wachtell, doubtless realizing that he had been too candid, broke off his sentence and attempted to take it back, stammering obsequiously:

> — well, I should not presume. In the event — I don't want to presume on anything. In the event that the

> global agreement should fail final Court approval for any reason, and my partner Mr. Rosen has the language that I think has been discussed between the parties as to the precise relation of the consideration.

Page 16 [A-202].

Remarks put on record at the conclusion to the August 27 hearing (Transcript, Pages 30-31 [A-212]) provide further circumstantial evidence of the Court's involvement. The following remarks bespeak "case closed – deal clinched" to any candid mind:

> MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of the parties I represent, I think probably on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. . . . I think Your Honor provided the spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.
>
> THE COURT: Thank you, gentlemen.
>
> MR. SNYDER: Your Honor, for the first time in this proceeding I agree with everything Mr. Wachtell says.
>
> (End of hearing.)

L. Commencement Of The *Ahearn* Class Action

On September 9, 1993, a hearing was held at an undisclosed location in New Orleans commencing at 6:00 P.M. Transcript of Proceedings, September 9, 1993 [A-213–A-220]. This hearing, held without notice to any party which might have registered objection, was orchestrated for the purpose of presenting an unprecedented *fait accompli* in the annals of class action history.

At the September 9 hearing numerous, momentous and unprecedented events were rushed through without the slightest consideration.

That there was no question of whether the weighty motions would be granted is shown by Mr. Wachtell's comment (Page 7

[A-217]) that "I was not planning to address it orally . . .", to which the Court responded:

> I see no reason for you to. *You are not writing on a clean slate here. These matters have been the subject of extensive negotiations between counsel that the Court has participated in.*

(Page 7 [A-217] [emphasis added in each instance]). To similar effect, *see* Transcript of August 27, 1993 at Page 10 [A-198] (referring to "previous conversations and extensive negotiations" between Court and counsel).

The Court closed the September 9 hearing by stating for the record:

> Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than any other that I am familiar with, with England running a close second, has depended on lawyers throughout its entire existence to solve its real problems. I think the work you have performed over the past few weeks, and specifically extremely difficult issues you dealt with in the past few days, is in the highest tradition of the profession. I'm proud of you. I've been pleased to be associated with you.
>
> I think you have all represented your respective clients extremely well. I think it is a significant thing you have done and I commend you. *We will trust in the scholarship, the good judgment and common sense of the ladies and gentlemen on the courts of appeal in the event this comes to their attention.*

(Pages 10-11 [A-219]).

M. Proceedings Below

The *Ahearn* Class Action was filed on September 9, 1993. On October 5, 1993, counsel undersigned appeared on behalf of the maritime claimants improperly included in the "futures" class. On November 19, 1993, counsel moved the court to decertify the class insofar as same encompassed merchant mariners. On

December 7, 1993, the maritime claimants moved the court to disqualify itself. That motion was denied by order dated January 10, 1994. The merchant mariners moved the Court to certify the recusal issue for interlocutory appeal, which motion was ignored. The mariners sought relief from the order denying recusal by Writ of Mandamus. The Fifth Circuit denied the writ, noting that the matter could be addressed upon a direct appeal.

The Fairness Hearing in *Ahearn* commenced on December 12, 1994. The mariners appeared and renewed their motion for disqualification. The Court denied the motion.

To no one's surprise, on July 27, 1995 the District Court approved both the *Ahearn* and *Rudd* settlements.[6] The merchant mariners timely appealed to Court of Appeals for the Fifth Circuit. After briefing and argument before a panel of the Court of Appeals[7], two members of the panel voted to affirm both *Ahearn* and *Rudd*. In a spirited dissent [90 F.3d at 993-1026; A-59-A-134], Judge Jerry E. Smith pointed out the manifold legal infirmities in the Global Settlement.

Rehearing by the original panel[8], as well as rehearing *en banc*, were sought as to the approval of the *Ahearn* Global Settlement. Rehearing *en banc* was denied on November 26, 1996 [*In re Asbestos Litigation*, 101 F.3d 368 (5th Cir. 1996)]. Judge Smith again dissented, joined by five of his colleagues[9], dissented from the denial of rehearing by the entire Fifth Circuit. Noting that five active circuit judges were recused from consideration the grant or denial of *en banc* rehearing and that a sixth had elected not to participate, Judge Smith pointed out that the

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6 In the proceedings below Petitioners Flanagan and Middleton opposed both the *Ahearn* and *Rudd* settlements. In the instant Petition Flanagan and Middleton seek review solely of the Global Settlement approved in the *Ahearn* litigation.

7 Reavley, Davis and Smith, JJ.

8 The panel denied rehearing without comment in an unpublished order on December 3, 1996. *In re Asbestos Litigation*, 1996 U.S. App. LEXIS 33548 (5th Cir., December 3, 1996) (unpublished) [A-187].

9 Garwood, Jolly, Jones, Emilio M. Garza and DeMoss, JJ.

effect was to require not a majority for the *en banc* procedure but "a supermajority of 82% — nine of the eleven participating judges". [A-3] Noting the unprecedented nature of the *Ahearn* settlement, Judge Smith urged that "The issues presented are worthy of consideration beyond the level of circuit panel review." [A-2]

Since the extraordinary supermajority could not be mustered, Judge Smith concluded with the obvious [A-3]:

> [T]he appellants' only recourse, in order to obtain review of the difficult and novel issue presented, is to petition the Supreme Court for writ of certiorari.

The Maritime Intervenors now do just that.

ARGUMENT

A. AMPLE GROUNDS FOR GRANT OF CERTIORARI

Rule 10 of this Court, "although neither controlling nor fully measuring the Court's discretion", suggests what may be appropriate occasions for the grant of certiorari. Petitioners Flanagan and Middleton assert the following grounds for the grant of their Petition:

[a] That in permitting the trial judge, who had substantial participation in the settlement negotiations, to sit at the Fairness Hearing on the class settlement, the Fifth Circuit has "sanctioned such a departure" from the accepted and usual course of judicial proceedings "as to call for an exercise of this Court's supervisory power";

[b] In the underlying litigation, the Court of Appeals for the Fifth Circuit "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter": the question of whether an opt-out right is constitutionally required in a class action for damages;

[c] That in ratifying the non-opt-out settlement, the Fifth Circuit "has decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court", that question being the opt-out right which this

Court enunciated in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

B. AN EXTRAORDINARILY IMPORTANT CASE

"Regardless of what else one can say about *Ahearn*, . . . no one can fairly accuse it of being an ordinary case." Dissent, 90 F.3d at 1021 [A-122]. "Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment." Dissent, 90 F.3d at 1026 [A-133].

Judge Smith's dissent highlights the precedent-setting importance of *Ahearn*, an importance the majority opinion purposefully ignored:

> This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit, WALL ST.J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map[10] for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Dissent, 90 F.3d at 994 [A-62].

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10 That "road map" leads unerringly to the Fifth Circuit, and will — if left unaltered — lend a new meaning to the term "forum shopping" (dare we say "dumping ground"). As every first-year law student knows, "the search for the forum with the most advantageous governing law lies at the very heart of the notion of forum-shopping." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 794 n.105 (D.C. Cir. 1980).

While the majority panel decision ignores the importance of its holdings, *Ahearn*'s dramatic implications for the world of mass-tort are clear to any thoughtful individual.

C. ESTABLISHING A PRECEDENT FOR A NON-OPT-OUT CLASS SETTLEMENT HAS IMPLICATIONS FAR BEYOND THIS CASE.

The majority was forced to admit that "appellants' arguments challenging the approval of the global settlement are not insubstantial" [Maj., 90 F.3d at 993; A-59], but sought to defuse the force of those arguments by adding that "on the unique facts presented here they do not carry the day.")

The dissent pointed out the error of that conclusion [90 F.3d at 994; A-62]:

> [T]he majority's reliance upon the "unique facts" of this case, see maj. op. at 993, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts — a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement — likely will become far too common now that the majority has approved of them.

Issuance of this unprecedented decision is tantamount to Pandora's error in opening the lid of her box. The majority opinion suggests, in essence, that "This rule holds only to red-headed Walpoles in pale magenta Buick cars." *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987) (Higginbotham, J., concurring opinion, quotation attributed to Karl N. Llewellyn, *The Bramble Bush* [1960]). This suggestion does not withstand the realities of the jurisprudence of *stare decisis* and the common-law method.

As another jurist of the Fifth Circuit has written[11]:

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11 **Higginbotham, J., *The Crisis in Legal Theory and the Revival of Classical Jurisprudence: Text and Precedent in Constitutional Adjudication*, 73 Cornell L. Rev. 411, 412-413 (1988).**

> In describing the mechanics of *stare decisis*, it is important to keep in mind that the deciding court cannot fully control the precedential force that its decision will have in the future. That strength is in the main given by the later decisionmaker. Of course, the first decider may write broadly and may even disclaim a holding, but the accepted decisional process makes this effort less than fully effective.

The notion that the pattern of a non-opt-out class settlement, premised upon a unilaterally-defined "limited fund" can be confined to the facts of this case, or even to the asbestos context, is not tenable. This is no more possible than preventing citation of the recent *Castano* decision in other factual settings.[12]

The result-oriented tenor of the panel opinion is troubling, and supports the dissent's charge that the trial and appellate jurists who have upheld the Global Settlement to date are wearing the hat of an elected politician, and not the black gown which is the proper garb of a judge.[13]

Also troubling is the panel majority's failure to acknowledge that its decision plows new ground. As the dissent wrote, this settlement is "the first no-opt-out, mass-tort, settlement-only, future-only class action ever attempted or approved." Dissent, 90 F.3d at 993 [A-60]. This is "a radical extension of the mandatory class action." Dissent, 90 F.3d at 1000 [A-75]. The Panel Opinion creates a "circuit split". Dissent, 90 F.3d at 996-997 [A-67–A-68]. "Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." *See also* Dissent, 90 F.3d at 1000 [A-77] ("A novel action

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12 *See, e.g.*, "5th Circuit Reverses Historic Castano Tobacco Class Action", *Mealey's Litigation Reports: Breast Implants* (June 13, 1996) (suggesting that the *Castano* decision "could have ramifications for *all types of mass tort litigation* . . ." (Emphasis supplied.)

13 In his concurrence in *Bhandari* v. *First National Bank of Commerce*, 829 F.2d 1343, 1352 (5th Cir. 1987), Judge Higginbotham warned that "we must not allow our version of a 'correct' result to deceive us into semantic games of reformulation and hair splitting in order to escape the force of a fairly resolved issue."

laden with such an extreme potential for abuse certainly demands a close look . . .").

D. A DECISION BY THIS COURT WILL PROMOTE CERTAINTY IN RESULT, PAVING THE WAY FOR LAWFULLY-STRUCTURED SETTLEMENTS.

The majority decision of the court below recites a laundry list of "insurmountable" problems which allegedly precluded any global or mass settlement funded by Continental. Maj., 90 F.3d at 970 [A-9]. But surmountability, like beauty, is in the eye of the beholder. It is clear that Continental's "insistence" upon a non-opt-out settlement was the driving force behind the use of Rule 23(b)(1)(B) for a non-opt-out certification. It is equally clear that this intransigence was fostered by a lack of clarity in the law of mass-tort settlements, such ambiguity giving rise to a "gleam" in Continental's corporate eye. Not law or principle, but rather naked self-interest, asked: *Can we get away with it [a non-opt-out class]?*

Lord Coke's ancient maxim is "The knowne certaintie of the law is the safetie of all." *Frilette* v. *Kimberlin*, 508 F.2d 205, 219 (3d Cir. 1974) (Adams, J., dissenting). *See also Boys Markets, Inc.* v. *Retail Clerk's Union, Local 770*, 398 U.S. 235, 240, 90 S.Ct. 1583, 1587 (1970) ("important policy considerations militate in favor of . . . predictability in the law").

This Court has already granted review of the *Georgine* opt-out, asbestos class action settlement. A similar ruling by this Court as to the *Ahearn* non-opt-out program (perhaps issued in concert with the *Georgine* decision) will dispel the uncertainty and pave the way for settlements of the "asbestos mess" — settlements which the participants can enter into with assurance.

Mass-tort litigants, lawyers and judges can all perform their respective roles better if they understand what the ground rules are. Better opt-out deals, or other more narrowly-focused settlements are not going to be crafted if asbestos defendants and other liable parties such as insurers believe that they can secure the proverbial "quick fix" via a non-opt-out class. If the

juridical equivalent of the atom bomb is available in the arsenal of the mass-tort defendant, it is inevitable that the weapon will be deployed. The tyrant of antiquity wished that humanity might have a single neck that he might cut it off. Tort defendants — quite understandably — will harbor a similar hope, and for just as long as a single Court, anywhere in the Union, gives them reason to do so.

Continental's mantra of "total peace — a non-opt-out or nothing" is a bluff, albeit successful thus far. Professor Laurence Tribe has criticized as "a complete myth" the theory propounded by some asbestos defendants that the only alternative to a settlement class action is "an infinite tangle of multi-armed lawsuits." Gotthelf, "Settlement Class Barred in Mass Asbestos Suit", *New Jersey Law Journal* (May 20, 1996) (pointing out that the CCR was settling 97-99% of lawsuits prior to filing of *Georgine*).

All parties to settlement negotiations engage in bluffery and puffery. They constantly pause to reevaluate their positions based upon the known rules and risks. One prominent asbestos defendant is reportedly considering its options in the wake of the *Georgine* and *Ahearn* decisions. "Owens Corning, Law Firms Sign Standstill Pact Pending Settlement Talks", Mealey's Litigation Reports: Asbestos (June 21, 1996). If the class settlements are struck down discussions might result in group settlements with individual plaintiff's law firms. *Id.*

As one insurance company vice-president was quoted as saying, "In the short-term, class actions may be under immense scrutiny and it may cost us more if we have to settle cases individually or in smaller classes. But in the long-run, we may get clearer guidelines on what's acceptable . . ." Schachner, "Insurers Not Surprised by Collapse of Deal; Class-Action Settlement May Offer Lower Legal Costs, But Courts Take a Dim View", *Business Insurance* (May 20, 1996).

The case law in the lower federal courts is in hopeless disarray. This Court is the last, best hope for "clearer guidelines".

E. AN AUTOMATIC PER SE RULE OF RECUSAL IS IMPELLING WHERE THE TRIAL COURT PRESIDES OVER THE CRAFTING OF A CLASS ACTION SETTLEMENT.

It would be a monumental understatement to say that the trial court in this cause most grievously "departed from the accepted and usual course of judicial proceedings", that two members of the Fifth Circuit panel "sanctioned such a departure by a lower court". The bizarre course of conducts cries out "for an exercise of this Court's supervisory power". Rule 10(a). It is no lawful excuse to assert that the judges and lawyers who conjured up this unprecedented settlement were well-intentioned, or were following a vision of some "greater good".[14]

In his dissent, Judge Smith bore witness to the truth of the claim that these Petitioners now bring before this Court:

> Apparently this is simply a case of judges — both trial and appellate — trying too hard to solve the vexing problems posed by unending asbestos litigation. Having certified at least two other high-profile asbestos class actions, then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. ***In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.***

Dissent, 90 F.3d at 993-94 [A-60–A-61] (emphasis supplied).[15]

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14 The dissent [90 F.3d at 998; A-71] noted as one of the majority opinion's "fundamental errors" the "treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good". *See also United States* v. *Bailey*, 327 F.Supp. 802, 807 (N.D. Ill. 1971) ("Periodically in our history, 'true believers' have urged that their ends justified whatever means were necessary to achieve them . . ."); *United States* v. *Meulener*, 351 F.Supp. 1284, 1286-87 (C.D. Cal. 1972) (in cases of great public concern, "it is easy to succumb to the expediency of the moment and, contrary to the Constitution, adopt the principle that the end justifies the means").

15 As one member of the asbestos defense bar commented, the more prominent asbestos judges "share a weakness for the grand gesture. . . . District judges are people, too. They like to see their names in the paper. Ego's not an irrelevant consideration." Labaton, "Judges Struggle to Control a Caseload Crisis", The New York *Times*, March 10, 1991.

These Petitioners take no relish in challenging a federal judge. Yet it is imperative to stand up and be counted when an unprecedented deal, cutting off the rights of literally hundreds of thousands of persons, ends up — *not* by random draw, but by design — before a judge who actively suggested, and helped to craft, that unprecedented deal. Given the stakes involved in such a case, this Court should hold that where a judge presides over settlement negotiations which affect the rights of absent persons, and where the settlement is one which cannot take effect without the imprimatur of the judiciary, that the settlement judge must step aside in favor of a jurist not subject to possible taint.

In 1935, Justice Harlan Fiske Stone wrote these words[16]:

> I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.

As Judge (and later Justice) Cardozo observed, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass judges by." B. Cardozo, *The Nature of the Judicial Process* 168 (1921). While humanity is a strength in a judge, it must be tempered by a sense of the limitations inherent both in the institution of the trial court and the human being through which the institution acts. In an excess of enthusiasm the best of men may make utterances which would cause a reasonable observer to harbor doubts as to whether he could fairly hear a case. When this happens, it is right and proper for a party concerned to stand up and ask the individual to step aside for the sake of the institution. It has been written:

> The outspoken words of a judge may raise a doubt as to his ability to see both sides. When he comes to meet such questions in actual judgment, his decision may

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16 A. Mason, *Harlan Fiske Stone: Pillar of the Law* 398 (1956).

> illustrate the adage of Erasmus, as they show "how easy the coach capsizes on the side to which it leans."

Putnam, *Recusation*, 9 Cornell L.Q. 1, 9 (1923).

Judge Parker's error lies not in his interest in grappling with the national asbestos problem — not in attempting to craft a settlement of Fibreboard's liabilities. His error lies in **proceeding to sit at the final hearing adjudicating the fairness of that settlement** after having been so heavily involved in structuring that settlement. *See* Dissent, 90 F.3d at 994 [A-61], n. 3 (noting that Judge Parker "was aggressively involved in the settlement", yet "presided at the fairness hearing on the very settlement he had helped to craft.")

The recently-revised Manual for Complex Litigation (3d) (Federal Judicial Center 1995) warns of the dangers of judicial entanglement in the settlement process:

> Nor should settlement efforts be permitted to impair the parties' perception of the assigned judge's fairness and impartiality. ... There is a danger ... that such involvement will affect the parties' confidence in the judge's ability to try the case impartially. For this reason, many judges prefer not to engage in substantive settlement negotiations in cases they are expect to try, particularly if there is to be a bench trial ...

MCL 3d § 23.11 at 167.[17] "To avoid the appearance of partiality, the assigned judge may refer the parties to another judge ... to conduct settlement negotiations." MCL 3d § 23.13.

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17 **There are dangers to judicial participation even in the everyday, non-class-action nonjury case. As one federal judge writes concerning the judicial role in settlement:**

> **I have no hesitation in rolling up my sleeves and going the whole way in an analysis of a jury case. I have some reservations about non-jury cases, but, if asked by counsel to participate, I will do so. You have to be a little more careful, and you have to indicate the possibility that you'll transfer the case to another judge for trial if it becomes apparent that, as a result of the negotiations, you are now prejudiced, or believe one side thinks you're now prejudiced, to the**

(*concluded on page 23*)

MCL 3d § 23.14:

> The judge must guard against the temptation to become an advocate — either in favor of the settlement because of a desire to conclude the litigation, or against the settlement because of the responsibility to protect the rights of those not party to it. Neither the proponents of the settlement nor those who are opposed or absent should be favored.

Speaking specifically of the mass-tort context, the Manual states (§ 33.29):

> As in other types of litigation, the assigned judge should be wary of extensive involvement in settlement. Although some judges participate actively in settlement negotiations, others take care to insulate themselves from the negotiations, leaving this activity to a special master or settlement judge; ***where judges have been involved,*** *they have turned over to another judge the responsibility for review and approval of the settlement.*

MCL (3d) at 334 (emphasis supplied), citing *Carlough* v. *Amchem Products, Inc. (a/k/a Georgine* v. *Amchem Products, Inc.)*, No. 93-215 (E.D. Pa. 1993).

There is a well-recognized danger in a trial judge involving himself so deeply in settlement negotiations that an appearance of impropriety is created should it be necessary for that judge to rule upon further contested matters which may arise in the course of a proceeding. Indeed, Judges Higginbotham and Parker both recognized this in the course of the Assignment Litigation. In his first communication to counsel after being

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(*continued from page 22*)

> **point where you couldn't fairly try the case. . . . In any event, I think in a non-jury case you ought to approach settlement discussions like porcupines presumably approach making love, and that is very carefully.**

Will, Merhige and Rubin, J.J., *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203, 211-212 (1976).

"appointed" as "settlement facilitator", Judge Higginbotham wrote to counsel:

> Judge Parker and I met yesterday. He gave me the list of counsel and some of the filed papers in this litigation. We have not discussed any details about possible settlements, and I know little about your litigation. *Chief Judge Parker and I agreed that we would not further discuss this case.* It is my plan to hold all communications with you in confidence and to report to Judge Parker only whether we are making progress. *Judge Parker and I think that he should be insulated hereafter from the settlement proceeding.*

(Emphasis supplied.) For reasons which are unclear, Judge Parker seems not to have perceived the same problem once negotiations on the "global" settlement commenced. At the August 9, 1993 hearing held in the Assignment Litigation, Judge Parker stated:

> The Court determined when the negotiations on the Motley cases began that *it would be inappropriate for the Court to supervise the negotiation because it was in a nonjury scenario and there remained the high potential that the Court would have to resolve both legal and fact issues.* This is purely a prospective settlement class which I would anticipate in the event of successful negotiation would be certified under 23(b)(1)(B). *There will either be an agreement or there will not be an agreement.* Therefore, the Court does not have the same concerns of being involved in the settlement process if involvement would assist counsel or the parties, with the exception of the controversy that exists between Continental and Pacific. *That still has the potential for being litigated, and the Court will not participate in any part of the process relative to that controversy.*

Transcript of August 9, 1993 at 37 (emphasis supplied in each instance). Clearly, the Court recognized the impropriety inherent in a process in which it would sit in judgment in a nonjury setting of a settlement in which it had been involved. It is a testi-

mony to the weaknesses and dangers of a non-adversarial proceeding that the Court failed completely to keep in mind its fiduciary duty to absent class members under Rule 23(e). The Court's statements suggest that it had the settlement of common-garden lawsuits in mind, in which litigants actually before the Court settle or not ("there will either be an agreement or there will not be an agreement"), as suits their whim, and may simply dismiss their cause without judicial scrutiny or approval. The Court failed to recognize that class members have a right to lodge objections to a proposed settlement; that the assigned judge must pass upon those objections before a class settlement may be finalized; and that every class member has a right to have such objections heard and adjudicated by a tribunal free of both actual bias as well as the appearance thereof. In essence, the "trial" of a class action settlement proceeding is "a nonjury scenario", in which there is the *certainty*, and not just the "high potential", that "the Court [will] have to resolve both legal and fact issues" concerning the settlement.

28 U.S.C. § 455 provides in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> * * *
>
> (d) For purposes of this section the following words or phrases shall have the meaning indicated:
>
> (1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
>
> * * *

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Even in the absence of statute, a neutral jurist is a matter of constitutional mandate. As the dissent wrote:

> "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in the outcome. *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).
>
> This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.
>
> ***The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.***
>
> * * *
>
> Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and pains-

> taking efforts, probably developed a natural bias in favor of his own work.

Dissent, 90 F.3d at 1013-1014 [A-105–A-106] (emphasis added).

The federal judge's role as the guardian of the class members under Fed. R. Civ. P. 23(e) is simply incompatible with *any* appearance of advocacy or partiality. The class member — the "man in the street" is entitled to a jurist who meets the stringent "Caesar's wife" standard. This Court should lay down a "bright line" rule which, while applauding all attempts for federal judges to help parties to resolve their disputes amicably, precludes a participant in settlement negotiations from sitting at a Rule 23(e) hearing.

F. THE FIFTH CIRCUIT'S RULING FAILS TO HEED THE OPT-OUT RIGHT GUARANTEED BY THIS COURT IN *PHILLIPS PETROLEUM CO.* v. *SHUTTS*.

All counsel stated in the opening statements made at the Fairness Hearing in *Ahearn* that the non-opt-out nature of the Global Settlement was the most difficult legal issue raised by the case. The majority opinion's approval of a non-opt-out class vaunt shadow over substance, and give carte blanche for any attorney to file an action in the Fifth Circuit with the caption "equitable" and unilaterally invoke Rule 23(b)(1)(B).

The majority correctly noted that the "central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos . . ." Maj., 90 F.3d at 976 [A-22]. It subsequent conclusion that no right to opt out need be allowed is a legal *non sequitur*, for it is precisely such claimants for money damages this Court has declared must be afforded the opt out right.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 2974, 86 L.Ed.2d 628 (1985), this Court stated:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an

> opportunity to be heard . . . . The notice should describe the action and the plaintiffs' rights in it. *Additionally, we hold that due process requires that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.*

472 U.S. at 811-812; 105 S.Ct. at 2974 (emphasis added). The Dissent stated the obvious in commenting that "*Shutts* could not be more unambiguous". 90 F.3d at 1002 [A-80]. It is self-evident that the claimants' causes of action for wrongful death or personal injury are classic actions for damages described in *Shutts*. A non-opt-out class action cuts across the grain of due process.

The Dissent noted [90 F.3d at 1002 n. 19; A-80–A-81]:

> Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. *See Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation.")

G. THE FIFTH CIRCUIT'S DECISION CREATES AN INTER-CIRCUIT CONFLICT.

The very first ground for grant of certiorari set forth in this Court's Rule 10(a) is that "**a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]**"

The Fifth Circuit's *Ahearn* decision creates a conflict among the circuits, for the "sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here." Dissent, 90 F.3d at 996 [A-67].

The import of *Shutts* was discussed in *In re Real Estate Title Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). The Third Circuit noted that pursuant to *Phillips Petroleum Co.* v. *Shutts*, where an absent class member has not been given the chance to opt out of an action involving both important injunctive relief and damage claims, the member must "either have minimum contacts with the forum or consent to jurisdiction" to be bound by orders issuing out of the class action court. 869 F.2d at 769. The Third Circuit rejected squarely the contention that imposition of minimum contacts requirement to class action litigation "would wreak havoc" with the class action scheme: "We do not agree with appellees' dire predictions." *Id.* Indeed, the Court observed that the ability of some plaintiffs to "extricate themselves from class action judgments" is "integral to the constitutionality of the class action procedure." *Id.*[18]

Likewise, in *Brown* v. *Ticor Title Insurance Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. granted in part*, 114 S.Ct. 56, 126 L.Ed.2d 26 (1993), *writ dismissed as improvidently granted*, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994), the Ninth Circuit held that a class action judgment rendered in a Multidistrict Litigation proceeding did not and could not foreclose a class member's right to seek money damages where the claimant had not been afforded notice and the opportunity to opt out. The Ninth Circuit was bound by the rule of *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811, n. 3, 105 S.Ct. 2965, 2974 n. 3, 86 L.Ed.2d 628 (1985).

The Dissent calls the Global Settlement's failure to afford an opt-out "raises a red flag", noting that "[e]ven the now-discredited *Georgine* settlement permitted opt-outs." 90 F.3d at 1000 [A-77].

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18 The Ninth Circuit cited approvingly the Third Circuit's similar ruling in *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989), *cert. denied*. Intervenors believe that the settling parties deliberately avoided filing the Class Action within the MDL-875 docket in Philadelphia in order to avoid this adverse authority.

CONCLUSION

As Chief Justice Marshall stated so long ago in *Marbury* v. *Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L.Ed. 60 (1803),

> The government of the United States has been emphatically termed a government of laws, and not of men.

Petitioners urge the Court to restore a modicum of certainty to the settlement of mass-tort cases by accepting review of this case and vacating the unlawful non-opt-out settlement. In the words of the trial judge, this is "what appellate courts are for".[19]

Respectfully submitted,

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DATED at Detroit, Michigan
this 21st day of February, 1997.

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19 Gordon Hunter, "Parker Out on a Limb in Asbestos Fight; Beaumont Judge Concedes Hitches in Class Action Plan", *Texas Lawyer* (August 27, 1990) (in response to challenge by counsel as to what authority existed to consolidate all state and federal asbestos cases into one huge federal class action, Judge Parker's reported response was "That's what appellate courts are for.")

Supreme Court, U.S.
FILED

961379 FEB 27 1997

OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States

October Term, 1996

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ON SUGGESTIONS FOR REHEARING EN BANC

(United States Court of Appeals — Fifth Circuit)

(Filed November 26, 1996)

(In re: ASBESTOS LITIGATION — JAMES FLANAGAN, et al., Appellants, VERSUS GERALD AHEARN, et al., Appellees — No. 95-40635; Appeal from the United States District

Court for the Eastern District of Texas, Opinion July 26, 1996, 5 Cir., 90 F.3d 963)

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The Court having been polled at the request of one of its members and a majority of the judges who are in regular active service not having voted in favor (FRAP 35 and Local Rule 35), the suggestions for rehearing en banc are DENIED.

*** Judges King, Higginbotham, Barksdale, Benavides, and Parker are recused and did not participate in the consideration of the suggestions for rehearing en banc. Judge Dennis also did not participate.**

JERRY E. SMITH, Circuit Judge with whom GARWOOD, JOLLY, JONES, EMILIO M. GARZA, and DEMOSS, Circuit Judges join, dissenting:

I respectfully dissent from the failure of the court to grant rehearing en banc. The result of this litigation, as implemented by the district court and affirmed by the panel majority, is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved. The issues presented are worthy of consideration beyond the level of circuit panel review.

Five of the active judges are disqualified from participating in this matter, and a sixth judge has elected not to participate in the consideration for rehearing en banc. Accordingly, it is not possible to determine whether, if all active judges were voting, a majority would decide to rehear this case en banc.

The applicable statute and rules require the affirmative vote of a majority of the active judges — here, nine of the seventeen active judges — for en banc considera-

tion, as recused and non-participating judges are counted as members of the court for purposes of the calculation.[1] The effect in this case is to require not a simple majority, but a supermajority of 82% — nine of the eleven participating judges — to favor reconsideration.

That onerous requirement has not been met. Accordingly, the appellants' only recourse, in order to obtain review of the difficult and novel issues presented, is to petition the Supreme Court for writ of certiorari.

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1 "Judges in regular active service who are disqualified for any reason or who cannot participate in the decision of an en banc case nevertheless shall be counted as judges in regular active service." 5TH CIR. R. 35.6. Under 28 U.S.C. § 46(c), rehearing en banc is "ordered by a majority of the circuit judges of the circuit who are in regular active service." *See* FED. R. APP. P. 35(a); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 4-5 (1963); *Western P.R.R.* v. *Western P.R.R.*, 345 U.S. 247, 250 (1953); *Variable Annuity Life Ins. Co.* v. *Clark[e]*, 998 F.2d 1295 (5th Cir. 1993), *suggestion for rehearing en banc denied*, 13 F.3d 833, 834 (5th Cir. 1994) (Smith, J., dissenting), *rev'd sub nom. NationsBank* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810 (1995).

OPINION

[CITE AS: 90 F.3D 963]

(United States Court of Appeals — Fifth Circuit)

(Filed July 26, 1996)

(In re ASBESTOS LITIGATION — James FLANAGAN; David H. Middleton; Kenneth Smith; Edee Cochran; Esteban Yanez Ortiz; John R. Allgood; Henry William Evers; Lester Eugene Taylor; Plant Insulation Company; Safety National Casualty Corporation, Appellants, v. Gerald AHEARN; James McAdams Dennis; Charles W. Jeep; James Drake; James Ellison; Roland Dearborn; Judith Dearborn; Kerwin Butcher; Dir., Workers Comp., Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor; Longshore Intervenor; William James Mitchell; Fibreboard Corporation; Bethlehem Steel Corporation; Continental Casualty Company; Pacific Indemnity; Francis McGovern; Owens-Illinois, Inc.; Penn Mutual Life Insurance Company; Columbia Casualty Company; CNA Casualty Company of California; Celotex Corp., Daniel Herman Rudd, Jr., on behalf of themselves and others similarly situated; Beverly White, on behalf of themselves and others similarly situated; John Hansel, on behalf of themselves and others similarly situated; Appellees — Nos. 95-40635, 95-40694; Appeals from the United States District Court for the Eastern District of Texas)

Before: REAVLEY, DAVIS and SMITH,
Circuit Judges.

W. EUGENE DAVIS, Circuit Judge.

In this consolidated appeal, we consider a number of challenges to the district court's approval of a class settlement of future asbestos victims with Fibreboard along with several related settlements. For the reasons that follow, we affirm the district court's judgment.

I.
BACKGROUND

A. PROCEDURAL AND FACTUAL HISTORY

Fibreboard, primarily engaged in the timber business, also manufactured asbestos-containing products from 1920 until 1971. By the late 1980's, asbestos-related personal injury and death claims against Fibreboard numbered in the tens of thousands. At that time Fibreboard had approximately $100 million in hard insurance assets available to pay these claims. It also had disputed coverage claims against two of its insurers, Continental Casualty Company and Pacific Indemnity. These coverage claims ultimately played a key role in the class settlement.

Continental issued a general liability policy to Fibreboard in 1957 which remained in force for two years. Although the policy had no aggregate limit, it had a per-occurrence limit of $1 million and a per-person limit of $500,000. Fibreboard contended that Continental's policy replaced a similar Pacific policy with a per-claim limit of $500,000 but no aggregate limit.

Fibreboard contended that these two policies provided coverage to Fibreboard for thousands of claimants. This argument rested on Fibreboard's "continuous trigger" theory which maintained that the policies covered Fibreboard if the claimant had been exposed to asbestos at any time before or during the time the policies were in force, provided the claimant at some time was exposed to Fibreboard's asbestos product.

In 1979, Fibreboard and other insureds filed a massive multi-party insurance coverage case in California state court against a number of insurers, including Pacific and Continental. Following years of litigation, including a trial extending over four years, Fibreboard prevailed in the trial court. In its 1990 opinion, the trial court accepted Fibreboard's continuous trigger theory as well

as Fibreboard's argument that the insurer was required to pay the full cost of defense for each claim covered.

The insurers appealed to a California intermediate appellate court. Argument was held in August 1993 while the settling parties in this case were attempting to reach a final agreement.

By 1988, Fibreboard had largely exhausted its coverage from insurers other than Pacific and Continental. It was unable to pay asbestos judgments and settlements as they occurred and also pay the continuing mounting defense costs. After the trial court in the coverage case issued several rulings in favor of Fibreboard, Fibreboard was able to develop a "structured settlement" program where payments to settle claims were deferred until resolution of the coverage case. Under this plan, most plaintiffs agreed to accept 40% cash up front with the balance due upon resolution of the coverage dispute. Additionally, Fibreboard agreed not to dissipate its assets and, in effect, to give the company to the plaintiffs if it lost its coverage case.

By mid-1990, Fibreboard's defense costs and settlement payments had mounted and Fibreboard looked for additional insurance resources. It proposed to both Continental and Pacific that they negotiate a complete settlement of its coverage claims. Continental declined to negotiate. Pacific, however, negotiated with Fibreboard and ultimately agreed to a settlement, "the Pacific Agreement." By this settlement, which was subject to a number of contingencies, Pacific's coverage was made available for claimants exposed to Fibreboard's asbestos products after 1959. The Pacific Agreement also purported to extinguish Continental's right to seek contribution from Pacific. Continental challenged this agreement in the District Court for the Eastern District of Texas in April 1993.

Even with the Pacific Agreement, Fibreboard faced acute problems with increased large-scale asbestos liti-

gation. In early 1991 it proposed an "assignment settlement" plan to plaintiffs' counsel. Unlike the earlier program, this plan allowed asbestos claimants to settle their claims against Fibreboard for an agreed sum, receive no cash up front but rather receive an assignment of Fibreboard's rights (to the extent of the settlement) against Continental. Fibreboard agreed to pay the settlement sum if the court ultimately exonerated Continental. Under this plan, the settlement was also contingent upon Fibreboard obtaining court orders validating its right to make an assignment in the face of an insurance policy provision barring Fibreboard from settling claims without Continental's consent. Plaintiffs' counsel recognized the risk that their clients would never receive the agreed-upon settlements under the assignment plan and pressed for higher settlement amounts for accepting this risk. Fibreboard, using Continental dollars, was willing to pay more. As a result, the average per-case settlement amount under the assignment plan more than doubled the average amount of the earlier structured settlements. Continental strongly disputed Fibreboard's right to make these assignments. This dispute led to further costly litigation.

In June 1992, a California trial court in *Andrus* v. *Fibreboard*[1] ruled in favor of Fibreboard and upheld Fibreboard's right to make the assignment settlements. The California intermediate appellate court denied writs, relegating *Continental* to review under the ordinary appellate process.[2]

In 1990 and 1991 Fibreboard broached the subject of a global settlement with Ron Motley, Joe Rice, Steven

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1 No. 614747-3 (Alameda Cty. Sup. Ct. June 1, 1992) reversed by *Fibreboard Corp.* v. *Continental Casualty Co.*, No. A059716 (Cal. App., October 19, 1994).

2 The trial court's decision in *Andrus* was reversed by the California appellate court in October 1994 after the Global Settlement Agreement was reached but before the fairness hearing was held.

Kazan and Harry Wartnick, all of whom were leading plaintiffs' asbestos counsel. Fibreboard proposed to use an assignment plan to accomplish the global settlement. Fibreboard sought to structure the settlement so that claimants would look only to its insurance assets if it won the coverage case and Fibreboard would give the company to claimants if it lost the coverage case. As Fibreboard's counsel later admitted at the fairness hearing, this approach was designed in part to "bring the [asbestos] litigation closer to Continental; it was important that Continental feel as threatened as Fibreboard did."

Fibreboard was not successful in negotiating a global settlement with plaintiffs' counsel. Fibreboard and the Ness Motley firm did, however, agree to settle at least 20,000 present asbestos claims with the possibility of expanding that number to a higher figure. Fibreboard again agreed to assign rights under the Continental policy instead of paying cash to fund this settlement. The higher settlement amounts necessary to accomplish these assignment settlements caused a further inflation of settlement values. With the conclusion of this Ness Motley settlement agreement, Fibreboard had entered into $943 million in assignment settlements during 1992 and had deferred settlement obligations at the end of that year aggregating over $1.2 billion, a sum that greatly exceeded its net worth.

As called for under this latest settlement, Fibreboard brought suit in the Eastern District of Texas seeking a determination that the assignment did not violate the Continental policy. Plaintiffs' counsel advised Continental that they had bound themselves contractually with Fibreboard to refrain from negotiating directly with Continental without Fibreboard's consent. Continental knew that Fibreboard and plaintiffs' counsel were actively engaged in negotiating a global settlement to be funded with Continental's money.

Thus, at the beginning of 1993, Continental was under intense pressure to join the settlement talks:

- Continental had been unable to obtain immediate review of the California trial court judgment in *Andrus* approving the unilateral assignment settlements.
- Fibreboard continued to close more and more assignment settlements at amounts Continental considered grossly excessive.
- Fibreboard and plaintiffs' counsel were seriously negotiating a multi-billion dollar settlement which Continental would be called upon to fund. And Continental was barred from the table.
- A new proceeding, in a forum Continental probably considered unfriendly, had been filed seeking validation of Fibreboard's assignment settlements.

In February 1993, Continental announced that it would seek a global resolution of its asbestos exposure under its Fibreboard policies. With the approval of the parties, Judge Parker named Judge Patrick E. Higginbotham of this court to serve as settlement facilitator.

In the settlement discussions with Judge Higginbotham, Continental made it clear from the beginning that it would only entertain a global settlement if the settlement brought "total peace." Continental was unwilling to pay billions in settlement and forego its substantial arguments against coverage without the assurance that it did not face unknown liabilities in the future. Thus, Continental was only interested in exploring a mandatory, non-opt-out settlement. Continental considered that an opt-out class presented it with a number of insurmountable problems:

- Because the deadline for opting out would likely come after a decision in the coverage appeal, plaintiffs would enjoy a one-way option: they could opt out if Continental lost the appeal but remain in if Fibreboard lost.
- Claimants with the most serious injuries were likely to opt out in disproportionate numbers.

- Accurate predictions of Continental's exposure to opt outs were extremely difficult, if not impossible, to make.

Skirmishes between Continental and Fibreboard initially prevented fruitful discussion. Fibreboard argued that Continental was barred contractually from direct discussions with plaintiffs' counsel. Fibreboard also threatened to continue its assignment settlements.

With Judge Higginbotham's help, the parties agreed to put these impediments behind them in an agreement signed on April 9, 1993. Fibreboard agreed to allow Continental a place at the negotiating table and to stop the assignment settlements. Continental agreed to fund 100% of any global settlement (Continental reserved the right to get whatever contribution it could from Pacific) and to use its best efforts to work with Fibreboard to reach a global settlement.

From April until July the parties attempted to negotiate a global settlement but these efforts met with little success. For a number of reasons Judge Higginbotham recommended and the parties agreed that they should first attempt to settle the Ness Motley inventory of some 45,000 present claims. On August 5, the parties reached the "Substitute Ness Motley Agreement" which was approved by the court on August 9.[3]

With the Ness Motley settlement behind them, the parties intensified their efforts to reach a global settlement. The August 27 date for oral argument in the California Court of Appeal in the coverage case injected a sense of urgency into these discussions. Plaintiffs' counsel realized that if Fibreboard lost the coverage

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[3] **In the Substitute Ness Motley Agreement, Continental agreed to pay a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. This agreement was used as a model to settle inventory claims of other law firms.**

case, Continental's funds, essential to any settlement, would be lost. Fibreboard faced immediate bankruptcy if it lost the coverage case. Continental and Pacific faced staggering liability in an unquantifiable amount if they lost the coverage case. The parties had reason to believe that the California appellate court would render a decision promptly after argument and perhaps give signals at argument on how it would rule. For these reasons all parties were driven to reach a settlement before the California court reached a decision in the coverage case.

At Judge Higginbotham's request, Judge Parker designated Messrs. Rice, Cox, Kazan, and Wartnick to "negotiate . . . the prospect of a Rule 23(b)(1)(B) settlement class composed of future plaintiffs with claims against Fibreboard."

A series of intense negotiating sessions followed. The absence of Pacific at the table remained a serious impediment and little progress was made. Over the weekend of August 21-22, faced with an impending trial on Continental's claims to invalidate the Pacific Agreement, Pacific agreed to share responsibility with Continental on a 35.29% to 64.71% ratio. This was the same ratio established by the trial court in the coverage case.

This proved to be the last impediment to an agreement. Continental and Pacific were now negotiating jointly. By August 23, Continental and Pacific (the Insurers) had offered $1.5 billion and plaintiffs' counsel demanded $1.7 billion. The parties asked Judge Parker to assist in a last-ditch effort to reach agreement before August 27.

Judge Parker and counsel spent the afternoon of August 26 in intensive negotiating sessions in an attempt to resolve the remaining differences between the parties. Late in the afternoon when settlement had not been reached, Judge Parker invited a core group of attorneys to his home outside of Tyler to continue the discussion.

After several hours of negotiations in this more informal setting, Continental agreed to contribute an additional $25,000,000 and Fibreboard agreed to contribute $10,000,000. Plaintiffs' counsel refused at this point to accept the $1.535 billion pot. But later, the key parties, by coincidence, met around midnight at a Tyler coffee shop. Plaintiffs' counsel, at that time, agreed to accept the tendered $1.535 billion global settlement offer.

On the morning of August 27, plaintiffs' counsel renewed a demand that there be a separate, back-up settlement between Fibreboard and the Insurers for the settlement of the coverage case if, for any reason, a court declined to approve the global settlement. The parties negotiated the entire day on August 27. Near the end of the day a settlement (termed the "Trilateral Settlement") among Continental, Pacific and Fibreboard was reached. These negotiations were undoubtedly shortened because the coverage case appeal was argued on the morning of August 27. The negotiating representatives received word after the argument that the court had announced that it intended to decide the case expeditiously.

Upon announcement of the settlement agreement in open court in Tyler on August 27, the parties directed communication to the California Court of Appeals advising the court of the agreement in principle. The parties asked the California court to defer a ruling on the issues relating to Fibreboard's dispute with Continental and Pacific pending completion of the necessary settlement documentation. The California Court of Appeals has continued to withhold a ruling pending final approval of the Trilateral Settlement.[4]

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[4] **After oral argument, the court granted a motion to sever issues unique to Fibreboard, Pacific and Continental in order to facilitate the Trilateral Settlement. Its decision regarding the claims of other participants in the case is *Armstrong World Industries, Inc.* v. *Aetna Casualty & Surety Co. et al.* , 45 Cal.App.4th 1, 52 Cal.Rptr.2d 690 (1996).**

The parties then set out to convert the Global and Trilateral Settlements into formal written agreements. They first addressed the Trilateral Settlement. Disputes arose over critical features of this agreement and it was not until October that Continental, Pacific and Fibreboard were able to reduce it to writing.

On September 9th, the *Ahearn* class action was commenced by the Global Health Claimant Class against Fibreboard. The Global Health Claimant Class consists of all persons with personal injury claims against Fibreboard for asbestos exposure whose claims had not been brought in a lawsuit, settled or included in a settlement agreement before August 27, 1993. Shortly after *Ahearn* was filed, Judge Parker entered a number of orders: Continental and Pacific were granted leave to intervene as party defendants; provisional class certification was granted; a TRO against commencement of further separate litigation against Fibreboard by putative class members was entered; and the court appointed as counsel to the plaintiff class, Rice, Cox, Kazan and Wartnick, and appointed Caplin & Drysdale as counsel to plaintiffs' counsel.

In October, Judge Parker appointed Professor Eric Green of the Boston University School of Law to serve as guardian ad litem for the class. Judge Parker noted

> that it would be desirable that there be the appointment of [a guardian] ad litem who is fully knowledgeable in asbestos mass tort matters but does not actively represent asbestos claimants. The function of the [guardian] ad litem is to review the settlement from the point of view of members of the class and thereby to afford the class additional assurance that their interest will be adequately protected.

Professor Green was directed to render a report to the court analyzing the fairness, reasonableness and adequacy of the settlement from the point of view of the members of the provisionally certified Global Health Claimant Class.

Plaintiffs' counsel then turned to documenting the Global Settlement Agreement. The parties did not resolve the hundreds of details necessary to complete this document until December 23. As Judge Parker noted, it was not until that date when the Global Settlement Agreement was signed that it became "clear that a final agreement would actually be reached."

B. TERMS OF THE SETTLEMENTS

1. The Global Settlement Agreement

The Global Settlement Agreement provides for the establishment of a trust, funded with $1.535 billion — the proceeds of the settlement. The trust is charged with administering and paying all of the Global Health Claimant Class members' asbestos-related personal injury and death claims against Fibreboard and the Insurers. Once the global settlement receives judicial approval, and the trust is fully funded, the Class members' claims against Fibreboard and the Insurers will be directed to the trust for processing and payment according to the procedures provided in the trust distribution process. The trust is to be managed by three trustees and subject to the general supervision of the court.

The Global Settlement Agreement seeks to provide, through the trust, a simple process for injured persons to quickly obtain a fair resolution of their claims and at the same time safeguard their ultimate right to resort to the tort system. The settlement further seeks, through spendthrift provisions, to limit the amount of the trust assets that can be paid out in any given year. This will protect assets so that they will be available to compensate injured class members whose claims develop far in the future. If a shortfall occurs in any year, payments during that year are prioritized so that the sickest claimants are paid first.

Under the Global Settlement Agreement, a claimant must first seek to settle with the trust after providing

requisite information to allow for evaluation of his claim. If no settlement is reached, the claimant will next proceed to mediation to attempt to resolve his differences with the trust. If the mediation fails, the claim will be submitted to arbitration, either binding or non-binding at the claimant's choice. If non-binding arbitration does not result in a resolution of the claim, a judge or judge's designee from the Eastern District of Texas will hold a settlement conference. If this does not produce a settlement, the claimant may proceed against the trust in the tort system, complete with a jury trial if requested. The recovery of the claimant in the tort system, however, is subject to a cap of $500,000 per claim and recovery of punitive damages is precluded. Attorneys' fees for claimant's counsel are limited to 25% of the compensation paid to the claimant. Any resulting judgment will be paid out over a period of years depending upon the financial condition of the trust at the time.

As consideration for their $1.535 billion payment, Fibreboard and the Insurers receive full releases from the Global Health Claimant Class for their asbestos-related claims. Fibreboard and the Insurers also release each other from all claims.

2. The Global Third-Party Claimant Class Settlement

This settlement is between representatives of Fibreboard's major co-defendants on the one hand and Fibreboard and its Insurers on the other. The settlement preserves credit rights for co-defendant third parties under the law of the forum. Where the claimant liquidates his claim against the trust before proceeding to judgment against the co-defendant third party, the third party receives whatever credit local law allows against the judgment. Any third-party co-defendant who suffers a judgment before the trust settles with the plaintiff and pays a Fibreboard share, succeeds to the plaintiff's rights against the trust, except for exit to the tort

system. The Global Third-Party Claimant Class releases Fibreboard and the Insurers as to all third-party claims for contribution and indemnity arising from the claims of Global Health Claimant Class members and agrees that approval of the Global Settlement Agreement will bar and enjoin Global Third-Party Claimant Class members from prosecuting any such claims against Fibreboard or the Insurers. Fibreboard and the Insurers in turn, release the Global Third-Party Claimant Class from any and all contribution and indemnity claims.

3. The Trilateral Settlement Agreement

The Trilateral Settlement Agreement compromises the longstanding coverage disputes between Fibreboard and the Insurers, Continental and Pacific. This settlement is to remain effective even if the Global Settlement Agreement ultimately fails to obtain judicial approval. With limited exceptions, the Trilateral Settlement fully discharges the Insurers from all of their Fibreboard policy obligations — both personal injury and non-personal injury claims. The Trilateral Settlement is not designed to settle any asbestos claims against Fibreboard. If the global settlement for some reason fails, the asbestos claimants may pursue Fibreboard in the tort system. If the Global Settlement Agreement is not finally approved but the Trilateral Settlement Agreement is, the Insurers will make available to Fibreboard a total of $2 billion to enable Fibreboard to defend and resolve asbestos-related claims filed against it.

C. Notice And Hearing

After a comprehensive campaign designed to give notice of the proposed settlements, the district court allowed wide-ranging discovery. The court allowed the Ortiz and Flanagan appellants to intervene to assist in making the record "relating to the fairness, reasonableness and adequacy of the proposed settlement — to assist the court in its ultimate decision in this case."

Thereafter the court held a comprehensive eight-day fairness hearing. In addition to issues relating directly to the adequacy of the settlement fund, the court heard expert testimony on the potential outcome of the coverage case appeal. Two experts, retired California Supreme Court Justice Marcus Kaufman and Yale Law Professor, George Priest, gave opinions that Fibreboard's trial court victory on coverage would be reversed by the California appellate courts. These witnesses testified that Fibreboard faced a substantial risk that its extensive assignment settlement program constituted a massive breach of the policy.[5]

Following the hearing, the court made detailed findings and concluded that the Global Settlement Agreement was fair, adequate and reasonable to the class and that the requirements for mandatory class certification under Federal Rules of Civil Procedure 23(b)(1)(A), (b)(1)(B) and (b)(2) were met.

D. RUDD

After the Trilateral Settlement between Fibreboard and the Insurers was reached, the Insurers insisted upon a judicial determination that the settlement was fair, reasonable and non-collusive and operated to terminate any rights claimants might otherwise have against the Insurers arising out of the policies. The *Rudd* action was filed to accomplish this purpose. The Insurers thus brought a declaratory and injunctive action in the Eastern District of Texas against two mandatory (non-opt-out) defendant classes: (1) the Trilateral Health Claimant Class — substantially the same as the *Ahearn* futures class, and (2) the Trilateral Third-Party Claimant Class, comprised of third parties with asbestos-related claims against Fibreboard. The district court appointed experienced counsel to represent each

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5 **See discussion of *Andrus* at note 2 and accompanying text.**

class.[6] Notice was then given to the classes informing them of the pendency of the action. Broad discovery was conducted and trial was held on February 13, 1995.

Following trial, the class representatives and counsel for both of the defendant classes advised the district court that they had concluded that it was in the best interest of these classes to consent to the relief the Insurers were seeking. Counsel filed position papers explaining their reasons. Notice of the class representatives' consent to the terms of the Trilateral Settlement was sent to the members of the two classes. Following a fairness hearing, the district court issued findings of fact and conclusions of law approving the classes' consent and certifying both classes as mandatory non-opt-out defendant classes pursuant to Rules 23(b)(1)(A), (b)(1)(B) and (b)(2) of the Federal Rules of Civil Procedure. Only two individuals represented by Leonard C. Jaques, Esq., challenge the district court's orders in this appeal. No member of the Trilateral Third-Party Claimant Class and none of the other intervening parties in *Ahearn* have lodged objections to *Rudd*.

II.
AHEARN

Appellants challenge *Ahearn* on a number of grounds which we consider below. The Ortiz intervenors are members of the Global Health Claimant Class who challenge certification of the class and the approval of the settlement. The Flanagan intervenors, also members of the Global Health Claimant Class, challenge certification in *Ahearn* and raise several objections specific to *Rudd*. We will refer to both groups of appellants collectively as "the intervenors."

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6 Class counsel for the Trilateral Health Claimant Class was James E. Coleman, Jr., of the law firm Carrington, Coleman, Sloman & Blumenthal, L.L.P. Class counsel for the Trilateral Third-Party Claimant Class were the same attorneys that represented the Global Third-Party Claimant Class.

A. RULE 23(A)

Rule 23(a) lists four prerequisites to a class action: (1) numerosity, (2) commonality, (3) typicality and (4) adequacy of representation. The district court found that all four of these prerequisites were satisfied. The intervenors do not dispute the district court's finding of numerosity, but argue that the Global Health Claimant Class meets none of the other prerequisites to a class action.

The intervenors argue that the district court erred by considering the circumstances surrounding the settlement and the evidence adduced at the fairness hearing in making findings under Rule 23(a). This argument is contrary to Fifth Circuit precedent and would require a court to ignore important and relevant information that sits squarely in front of it when deciding whether to certify a settlement class. In *In re Corrugated Container Antitrust Litigation (Container I)*, we held that the district court should consider the settlement in deciding whether the settlement class satisfied the prerequisites of Rule 23. 643 F.2d 195, 211 (5th Cir.), *aff'd*, 659 F.2d 1322 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294, and *cert. denied*, 456 U.S. 1012, 102 S.Ct. 2308, 73 L.Ed.2d 1309 (1982). We rejected a challenge to the district court's finding that the class was adequately represented as required by 23(a)(4) and found that the terms of the settlement were vitally important to the determination that certification was appropriate. *Id.*

Most circuits to decide the issue have held that courts should consider the settlement in determining whether Rule 23 prerequisites are satisfied. See *Malchman* v. *Davis*, 761 F.2d 893, 900 (2d Cir. 1985) (certification appropriate because "the interests of the broadened class *in the settlement* were commonly held") (emphasis added); *White* v. *National Football League*, 41 F.3d 402, 408 (8th Cir. 1994) *cert. denied* ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995) ("adequacy

of class representation . . . is ultimately determined by the settlement itself"); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987) ("in assessing the propriety of class certification, the courts evaluate the negotiation process and the settlement itself"); *In re A.H. Robins Co., Inc.*, 880 F.2d 709, 740 (4th Cir.) *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989) ("if not a ground for certification per se, certainly settlement should be a factor, and an important factor to be considered when determining certification"). Only the Third Circuit has refused to look at settlements before it when deciding class certification issues and even that court admits that taking the settlement into account may be "the better policy." *Georgine* v. *Amchem Products, Inc.*, 83 F.3d 610, 617-18 (3d Cir. 1996). The rule that a court should consider a proposed settlement, if one is before it, when deciding certification issues makes good sense. Settlements and the events leading up to them add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint. See Herbert Newberg & Alba Conte, *2 Newberg on Class Actions* § 11.28 at 11-58 (3d ed. 1992) (in settlement class context, common issues arise from the settlement itself).

We are bound to follow *Container I*'s holding that the district court can and should look at the terms of a settlement in front of it as part of its certification inquiry. We would adopt this rule even if we were not bound by precedent because it enhances the ability of district courts to make informed certification decisions.

1. Commonality and typicality

The district court, in its findings of fact, found that the entire Global Health Claimant Class had the following issues in common:

> (i) avoiding the potentially disastrous results of a loss by Fibreboard in the *Coverage Case* appeal;

> (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transactions costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

The intervenors do not disagree that the settlement class holds these issues in common. Instead, they argue that these issues do not support a finding of commonality because they are derived from the settlement rather than from the *Ahearn* complaint. As we noted above, this argument has no merit and is foreclosed by our holding in *Container I*. Because the evidence is overwhelming that the class holds the above issues in common under the settlement (even the intervenors concede this point), we agree with the district court that the *Ahearn* action and the Global Settlement Agreement presented it with questions of law and fact common to the entire Global Health Claimant Class.

Typicality focuses on the similarity between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent. *Jenkins* v. *Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The district court found that the legal and remedial theories of the representative plaintiffs were typical of the class because all members of the Global Health Claimant Class presented claims based on exposure to Fibreboard asbestos. The district court also found that the named plaintiffs' interests in maximizing recovery for the class and eliminating the risk posed by the insurance coverage litigation were identical to interests held by all members of the class.

The intervenors do not argue that the named plaintiffs' claims rest on theories different from those of the other class members. Instead, in their attempt to show

that the class is too diverse to meet the typicality requirement, they point to individual issues such as varying family situations, separate histories of cigarette smoking, differences in medical expenses and differences in state law. These differences will certainly result in significant differences in the amount of damages that each claimant recovers but do not affect the settlement in the least. The Global Settlement Agreement does not award damages to individual victims:[7] it provides money and an equitable distribution process to pay victims.[8]

The central remedial and legal theory of each of the named plaintiffs, that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos, is typical of the entire class. Even the definition of the class makes this clear.[9] Further, the issues that brought the named plaintiffs to settle *Ahearn* are the same issues that the district court found common

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7 Determinations of individual damage awards will be made by the trust and the plaintiff's attorney in settlement negotiations or in a full trial on the merits. The back-end opt out provision will force the trust and plaintiffs to consider state law and individual circumstances, such as smoking history, when negotiating damages because the alternative to agreement is a full trial by jury under relevant state law.

8 This is in stark contrast to the *Georgine* case where the settlement attempted to award damages to class members based on the severity of their injuries alone, 83 F.3d 610 (3d Cir. 1996). We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In *Ahearn*, only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in *Georgine*.

9 The Global Health Claimant Class consists of persons who have been exposed "to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability . . .."

to the entire class. The named plaintiffs settled *Ahearn* because of their desire to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. These same concerns affect each member of the Global Health Claimant Class. We are satisfied that the district court did not abuse its discretion by finding that the issues of law and fact faced by the named plaintiffs were typical of the Global Health Claimant Class.

2. Adequacy of representation

The intervenors argue that the district court should not have certified the Global Health Claimant Class because of impermissible conflicts of interests by class counsel.[10] Rule 23(a)(4) states that a class action may be maintained only if "the representative parties will fairly and adequately protect the interests of the class." This requirement for fair and adequate representation encompasses both class representatives and class counsel. *North American Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir. 1979). However, "[j]ust what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances." *Guerine* v. *J & W Investment, Inc.*, 544 F.2d 863, 864 (5th Cir. 1977), citing *Johnson* v. *Georgia Highway Express Inc.*, 417 F.2d 1122 (5th Cir. 1969). The district court has the continuing duty to see that the class is adequately represented. *Guerine*, 544 F.2d at 864.

A district court may not certify a class without concluding that class counsel are "'qualified, experienced, and generally able to conduct the proposed litigation.' Obviously, an attorney who should be disqualified because of a conflict of interest will not meet this

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10 **Intervenors do not challenge the adequacy of representation of class representatives so we do not consider this issue.**

requirement." *North Amer. Acceptance*, 593 F.2d at 644 (quoting *Johnson* v. *Georgia Hwy. Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969)).

In August 1993, the district court, on the recommendation of Judge Higginbotham, formally appointed four counsel (Messrs. Rice, Cox, Kazan, and Wartnick) to represent the Global Health Claimant Class. Messrs. Rice and Cox are partners with the Ness Motley firm, one of the leading U.S. firms representing asbestos claimants. Ness Motley has been engaged in litigation with Fibreboard since 1990. Mr. Kazan is a partner with Kazan, McClain, Edises, & Simon. He has handled asbestos-related cases for about twenty years. Mr. Wartnick is a member of the law firm of Wartnick, Chaber, Harowitz, Smith & Tigerman. His practice has been devoted to representing asbestos claimants since 1981. In addition to their experience in asbestos litigation generally, Messrs. Kazan and Wartnick were Fibreboard's chief litigation adversaries on the West Coast, where Fibreboard is located. The appointed class counsel retained the firm of Caplin & Drysdale to advise them in areas outside their own expertise.

The district court found that these counsel are "prominent attorneys, highly respected for their knowledge, experience, skill and special competence in the field of asbestos litigation" and that they provided "adequate, professional and ethical representation" to the class.

The intervenors do not question the skill, competence or experience of class counsel, but instead argue the existence of impermissible conflicts that prevented them from adequately representing the class. Both sides agree that in determining the existence of a conflict, we look to the ABA Model Rules of Professional Conduct for guidance. Rule 1.7 states:

> (b) A lawyer shall not represent a client if the representation of that client may be mater

ally limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Model Rules of Professional Conduct, Rule 1.7(b).

At the fairness hearing, the intervenors and the settling parties each called a legal ethics expert to express an opinion on whether class counsel had conflicts.

The intervenors offered Professor John Leubsdorf, a law professor at Rutgers University Law School who has taught courses in civil procedure and legal responsibility. The district court qualified Professor Leubsdorf as an expert on issues of legal ethics and professional responsibility but found him lacking in practical experience in mass tort litigation.

The settling parties called Professor Geoffrey Hazard, a law professor at the University of Pennsylvania Law School and a recognized scholar in the field of legal ethics and professional responsibility. Professor Hazard was a member of the Rand Civil Justice Institute advisory council for studies concerning asbestos litigation and a reporter to the commission responsible for the preparation of the ABA Model Rules of Professional Conduct. Moreover, Professor Hazard has previously testified in asbestos cases and has extensive experience as a consultant in this type litigation.

After hearing the testimony of both the legal experts and the negotiators, the district court credited Professor Hazard's testimony as "consistent with existing federal legal principles and the underlying facts of this case." The court found that Professor Leubsdorf's testimony in a number of areas was either not supported by the factual record or contrary to settled federal law. Also, the district court felt that Professor Leubsdorf's conclusions and recommendations often were speculative and impractical because of his insufficient experience in mass torts and asbestos litigation. The record amply supports these findings.

The intervenors argue that class counsel for the Global Health Claimant Class had impermissible conflicts due to concurrent representation both (1) of present asbestos claimants and the Class of future claimants and (2) of purported conflicting subgroups within the class.

a. Alleged conflict between present claimants and the class

The intervenors contend that class counsel by simultaneously representing both present claimants and the class of future claimants represented clients who were directly competing for Fibreboard's limited resources. The district court found that during the negotiations no conflict existed that materially limited counsel's responsibilities to the future claimant class.

In analyzing whether a conflict existed, both Professor Hazard and the guardian ad litem appointed for the futures class, Professor Eric D. Green, divided the three-year negotiations period into smaller discrete time periods: (1) Early 1991 through April 9, 1993; (2) April 9, 1993, through August 9, 1993; (3) August 9, 1993, through August 27, 1993; (4) August 27, 1993, through October 12, 1993; and (5) October 12, 1993, through December 23, 1993.

(*i*) Early 1991 through late March 1993

Most of the settlement discussions until late March, 1993 were between only Fibreboard and class counsel. The Insurers did not participate. These exploratory discussions focused on a possible settlement with both present and future claimants combined in an opt-out class. Fibreboard was still seeking to settle by assigning its insurance rights to the class. During this time, Fibreboard continued to settle various law firms' "inventories" of present claims, including claims with the law firms of the four class counsel. Again, Fibreboard accomplished these settlements by assigning its insurance rights against Continental and Pacific; thus, these settlements were contingent on a favorable decision for Fibreboard in the California coverage case.

During this period, Fibreboard executed the initial Ness Motley agreement which settled approximately 20,000 inventory claims with the Ness Motley firm. This agreement required Fibreboard to obtain Continental's consent to this assignment of insurance rights or to seek a court order approving the assignment. In January 1993, Fibreboard filed suit against Continental in the Eastern District of Texas to obtain the court order.

Professor Hazard testified that during this time period no conflict existed between the present and future claimants because all discussions of a global settlement included both groups and both groups shared the risk of losing the coverage case. If coverage was found and if assignment was not a breach of contract, then the insurance policies of Continental and Pacific offered potentially unlimited coverage.

(*ii*) April 1993 through August 9, 1993

In March 1993 Continental joined the negotiations and Judge Parker appointed Judge Higginbotham as a settlement facilitator. In an April 9, 1993 agreement, Fibreboard agreed to stop executing assignment settlements and Continental agreed to work toward a global settle-

ment of all present and future claimants, including both pre- and post-1959 exposed claimants. But Continental insisted that the settlement be a mandatory, non-opt-out class and that Pacific contribute to the total settlement fund. Class counsel began to consider a mandatory class, but only if the settlement proceeds were adequate to insure fair restitution to present and future claimants and if a back-end opt-out provision was included. During this period, Continental filed suit in the Eastern District of Texas against both Pacific and Fibreboard seeking a declaration that the Pacific Agreement did not impair Continental's contribution rights against Pacific.

Fibreboard, now joined by Continental, continued negotiations on inventory claims. Specifically, Fibreboard and Continental began negotiations with the Ness Motley firm on a revised Ness Motley agreement. The parties succeeded in reaching the Substitute Ness Motley Agreement on August 5, 1993. Generally, Continental agreed to a higher-than-average value per claim with one-half due at closing and the remainder contingent on the outcome of the coverage case or on the existence of a settlement. Other inventory settlements were modeled after the Substitute Ness Motley Agreement.

Now that Fibreboard's suit against Continental concerning the initial Ness Motley agreement was settled, Continental sought an immediate trial of its suit against Fibreboard and Pacific. Continental's primary objective was to motivate Pacific to join the global settlement negotiations.

The intervenors argue that an impermissible conflict existed because the Ness Motley counsel were simultaneously negotiating for both present claimants (the inventory claims) and the class of future claimants. Professor Hazard testified that the present and future claimants were not competing for the same funds. At this stage of the negotiations, counsel were concen-

trating on the settlement of their inventory of present claims. It is true that they were also discussing a global settlement, but these discussions were in the preliminary exploratory stage. Certainly, at this time, counsel had no well-formed notions of how much Continental was willing to pay to settle the future claims.[11] For this reason, Professor Hazard explained that each attorney in good faith was attempting to obtain the maximum dollar amounts for present claimants he represented, as well as for the future claimants. Counsel certainly knew in a general way that there was a sum beyond which Continental would not pay. But because they did not know that limit, they did not know that this limit would be less than an amount they were willing to accept in settlement for both classes of claimants.[12] As the district court found, the Substitute Ness Motley Agreement likely aided the global settlement by increasing the average value per claim. We are persuaded that the record supports the district court's conclusion that class counsel vigorously represented both the present claimants and their future claimant clients against the same defendant.

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11 **As Professor Hazard testified:**

> **Q. Well, to your knowledge, did the reality ever occur here to the plaintiff's lawyers that there would not be enough money to pay all future claimants?**
>
> **A. They confronted a situation in which there was an external event creating a severe risk that that could happen. If Fibreboard won the coverage litigation without qualification as to the extent of the coverage, then there was enough money to the extent of the insurance company's resources, which I take it for practical purposes [sic] without limit; that is they would have to charge present policyholders to pay the money, but presumably if they stayed in the business they could do that.**

12 **Professor Hazard discussed the difference between the real-world concept of conflict of interest with the imaginary concept of a reserve price:**

(concluded on page A-30)

(*iii*) August 9, 1993, through August 27, 1993

On August 9, 1993, on the recommendation of Judge Higginbotham, the district court appointed Messrs. Rice, Cox, Kazan, and Wartnick to negotiate the prospect of a settlement class composed of future claimants. The court knew that this settlement would have to be reached before the decision in the coverage case, which was expected on August 27, 1993. The court felt compelled due to this severe deadline and to the complexity of the issues to appoint only highly competent and experienced attorneys who understood asbestos litigation. Professor Leubsdorf testified that the court should have required all class counsel to settle their present claims for cash or should have appointed other counsel. The district court did not err in concluding that this suggestion was impractical and would have seriously impeded any settlement.

From August 9, 1993, to August 27, 1993, appointed counsel negotiated a global settlement. On August 22, 1993, Continental and Pacific reached an agreement to settle their dispute, vastly improving the odds of a

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(*continued from page A-29*)

Q. That's your opinion, whether or not there's an ethical violation depends upon the reasonableness of the settlement? Is that right?

A. It depends — I think the judge said — I think I heard him to say the circumstances. That is, the conflict of interest is a real-world concept, not a theoretical concept. Therefore, one has to consider the real-world circumstances. Economists do a lot of thinking about — how shall we say — the potential of reality. A reserve price in the context of real-world negotiation is an imaginary number. The person who offers the money finally doesn't know what he is going to offer until he offers it. He may have the clearest idea, the firmest opinion, the strongest wish, and yet you can have a settlement or there will be a few bucks more. How do you possibly reconcile the notion that he had a firm, irreducible, unremovable, firm reserve price with the fact that he settled for a little bit more? It's because you're talking about different kinds of things.

global settlement. The district court found that all negotiations during this time were vigorous, contentious, and at arm's length. Professors Hazard and Green both testified that the future claimants were not impaired by counsel's representation of present claimants during this period. Indeed, they found that the present claimants had a substantial interest in a global settlement because such a settlement would secure their contingent back-end payments under the Substitute Ness Motley Agreement. Class counsel were also aware that any class settlement must be approved by the court and would face meticulous scrutiny. Thus, the present and future claimants had two common interests in reaching a settlement. First, they both wanted to avoid the risk of Fibreboard losing the coverage case. Second, they both wanted a diligently negotiated settlement: the future claimants wanted the settlement that yielded them maximum dollar recovery; the present claimants wanted a settlement that would withstand intense judicial scrutiny.

(*iv*) August 27, 1993, through October 12, 1993

From August 27, 1993, after announcing the Global Settlement Agreement in principle in open court, until October 12, 1993, when the Trilateral Settlement Agreement was reached, class counsel conducted no negotiations on the terms of the Global Settlement Agreement. On October 12, 1993, the district court appointed Professor Green as the guardian ad litem of the future class.

(*v*) October 12, 1993, through December 23, 1993

From October 12 to December 23, 1993, when the Global Settlement Agreement was executed, the settling parties negotiated the specific terms of the agreement. By this time, the Trilateral Settlement Agreement had already been executed and would have triggered the back-end payments for the present clients in the Ness Motley or similar agreements even if the global settle-

ment failed. Thus, the present clients' settlement was secured and they no longer had an interest in a global settlement. The record supports the district court's finding that the negotiations during this period were vigorous and that the class was adequately represented.

Thus, the district court considered the intervenors' conflicts argument for the entire time the settlement negotiations were underway and found that, at no time, did a material limitation on the representation of the class by class counsel exist due to concurrent representation of present and future claimants. The court did not err in reaching this conclusion.

b. The alleged intraclass conflicts

On appeal, the intervenors assert only two claims of intraclass conflict: (1) interests of class members who presently have an asbestos-related illness (the "near" futures) and members whose illness will not be apparent for many years (the "far" futures); and (2) interests of class members exposed pre-1959 and members having only post-1959 exposure.

Whether a conflict exists is governed by Rule 1.7(b) as discussed above. Not every intraclass conflict, however, will preclude approval of the settlement for inadequate representation. See *Container I*, 643 F.2d at 207-08.

The district court found that neither subclasses nor separate negotiating attorneys were required because no material intraclass conflict existed. The court found the common interests far outweighed any divergent interests the intraclass groups might have. The court enumerated those common interests as follows: avoiding the catastrophic results of a loss by Fibreboard in the coverage case appeal; maximizing the total settlement contribution from Fibreboard and the insurers; streamlining the procedures for the filing, processing, and resolution of claims, thereby reducing transaction costs and delays in compensation; minimizing the percentage of their compensation diverted

from the fund to pay attorney's fees; and adopting procedures that provide for payments to claimants in an equitable manner.

Intervenors suggest two intraclass conflicts. First, they argue that the "near" futures would prefer a settlement agreement that places no limits on the amount an individual may recover because these claimants do not anticipate that Fibreboard's assets will be depleted before their claims mature. The "far" futures, on the other hand, would prefer to limit individual claims to conserve funds so that resources will be available to pay for their future illnesses.

Professors Hazard and Green found no conflict between these two groups that would materially impair the performance of class counsel. Specifically, each found that the common interest in avoiding a lack of coverage vastly overwhelmed any differences between these groups. The "near" futures have no assurance that they would fare better in the absence of the Global Settlement Agreement. These claimants would face the risk that Fibreboard would live up to its pledge to actively defend any claims and delay any recovery. These claimants would also face the risk of attrition of available funds from increased legal fees. Under the Global Settlement Agreement the entire class is benefited by the greater likelihood that funds will be available to compensate both "near" and "far" future claimants under a less complicated system.

The intervenors rely on *In re Joint Eastern & Southern District Asbestos Litigation (Findley)*, 982 F.2d 721 (2d Cir. 1992) to support requiring subclasses for the "near" and "far" futures. In a settlement trying to save the Manville Trust from insolvency, the Second Circuit held that subclasses were required for a Rule 23(b)(1)(B) non-opt-out class because of clear conflicts between class members. More particularly, the Second Circuit did require subclasses for groups comparable to our "near" futures and

"far" futures. But the terms of the Manville Trust required that conclusion: significantly, the Second Circuit opinion makes it clear that a "near" future claimant was assured of recovery under the Manville Trust instrument if the claim was filed before the Trust ran out of money because the Trust operated on a strict order-of-filing priority. The settlement abandoned this priority to the prejudice of the near futures. Counsel, in negotiating such a settlement, had a clear conflict between the "near" futures whose recovery rights were secure and the "far" futures who had no such security. As explained above, our "near" future claimants without the Global Settlement Agreement are not assured of a priority payment and have no assurance that funds will be available or when funds can be obtained if they are required to litigate with Fibreboard.

Next, intervenors argue that counsel could not represent claimants who were exposed before 1959 and after 1959 in negotiating a global settlement. They contend that this conflict exists because a pre-1959 exposure claimant's case has a higher settlement value than a post-1959 exposure claimant's. This is premised on the argument that pre-1959 claimants have a greater likelihood of available insurance coverage because both Continental and Pacific insurance policies covered only pre-1959 asbestos exposure. The Intervenors recognize that the Pacific Agreement gave Fibreboard $330 million to use in post-1959 claims. They argue however that Continental affords potential unlimited fund coverage to the pre-1959 claimants.

Professors Hazard and Green both found no substantial conflict between pre- and post-1959 claimants. Both pre- and post-1959 claimants share the common class interests recited above. Neither the Substitute Ness Motley Agreement, the Trilateral Settlement Agreement, nor the Global Settlement Agreement distinguish between these two groups of claimants in any way. To distinguish between the two groups in the Global Settle-

ment Agreement was impractical because the class had no chance of persuading Fibreboard to agree to a settlement that did not address the claims by both groups. Also, to maintain the distinction in the Global Settlement Agreement would have undermined the attempts to provide maximum compensation and an efficient, streamlined process to claimants.

The district court made the following findings of fact: (1) all negotiations were vigorous and at arm's length, often conducted under the auspices of Judge Higginbotham; (2) common interests within the class overwhelmed minimal conflicts; (3) the settlement treated all class members the same; and (4) the Global Settlement Agreement was fair and reasonable, a finding that the intervenors have not appealed. The independent guardian ad litem also found that class counsel had no conflicts and that the Global Settlement Agreement was fair and reasonable and was the best alternative available. The district court did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required.

B. CERTIFICATION UNDER 23(B)(1)(B)

We turn next to the intervenors' challenge to class certification under 23(b)(1)(B).

Rule 23(b) states that where the prerequisites of 23(a) are met, a class action may be maintained if

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> . . .
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications

> or substantially impair or impede their ability to protect their interests.

Fed.R.Civ.P. 23(b).

The district court found that the prosecution of separate actions by members of the Global Health Claimant Class would substantially impair or impede the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets. This finding has strong support in the record and is not clearly erroneous. The district court heard expert testimony on the probable number, mix and timing of future asbestos personal injury claims against Fibreboard, the anticipated costs of defense relating to such claims, and the present value of Fibreboard's non-insurance assets. The experts agreed that Fibreboard faced enormous liability and defense costs that would likely equal or exceed the amount of damages paid out. More importantly, these experts testified that even under the Trilateral Settlement Agreement where Fibreboard is given $2 billion in insurance money to add to its own value of approximately $235 million, Fibreboard would be unable to pay all the valid claims against it within five to nine years. The district court credited the testimony of these experts and found that Fibreboard is a limited fund.

1. Rule 23(b)(1)(B) and the Bankruptcy Code

The intervenors argue that if the reason Fibreboard is a limited fund is because it will become insolvent before it pays all claims, then the Global Settlement Agreement is an impermissible attempt to circumvent bankruptcy proceedings and bankruptcy's absolute priority rule.[13] This argument fails to consider (1) decisions of other courts which have certified 23(b)(1)(B)

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13 The absolute priority rule requires that more senior creditors (such as tort creditors) be paid in full before junior claimants (such as shareholders) receive any distribution from an insolvent company.

classes because the claims of the class would bankrupt the defendant, (2) the significance of Fibreboard's settlement with its insurers in driving the Global Settlement Agreement, (3) the plain meaning of Rule 23, and (4) the nonexclusivity of the Bankruptcy Code and its inferiority to a 23(b)(1)(B) class action in the instant case.

Other courts have uniformly found that, in appropriate and limited circumstances, potential or probable insolvency of a defendant can create a limited fund appropriate for adjudication under Rule 23(b)(1)(B). The Second Circuit, in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, upheld the district court's conclusion that the likely insolvency of the Manville Trust rendered it a limited fund and qualified it for treatment under Rule 23(b)(1)(B). 982 F.2d 721, 739 (2d Cir. 1992) (cited with approval in *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 78 F.3d 764, 777-79 (2d Cir. 1996)). In *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), the Second Circuit approved a 23(b)(1)(B) class action on the ground that individual litigation would reduce the recovery for all plaintiffs from Drexel's limited assets. *Id.* at 292. See also, *In re Joint Eastern and Southern District Asbestos Litigation (Eagle-Picher Industries)*, 134 F.R.D. 32, 34 (E. & S.D.N.Y. 1990); *Coburn* v. *4-R Corporation*, 77 F.R.D. 43 (E.D. Ky. 1977).

In fact, even courts that have refused to certify 23(b)(1)(B) classes have done so on the ground that the parties seeking class certification have failed to present sufficient evidence that the assets of the defendant are insufficient to pay the claims against it. See *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988); *In re School Asbestos Litigation*, 789 F.2d 996, 999 (3d Cir. 1986); *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 305-06 (6th Cir. 1984); *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 852 (9th Cir. 1982); *Green* v. *Occidental Petroleum Co.*, 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *In re "Agent*

Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D. N.Y. 1983); *Payton* v. *Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979).

In support of their claim that any 23(b)(1)(B) limited-fund action based on a defendant's insolvency is an improper circumvention of the Bankruptcy Code, the intervenors can rely only on dicta from *In re Joint Eastern and Southern District Asbestos Litigation (Keene)*, 14 F.3d 726 (2d Cir. 1993).[14] The intervenors' conclusion is contrary to the overwhelming majority of court decisions on this issue, ignores crucial facts in both *Ahearn* and *Keene* and reads *Keene* in a way that creates an intra-circuit split in the Second Circuit.

Ahearn's Global Settlement Agreement was undisputedly driven by insurance coverage litigation between Fibreboard and its insurers which created a serious risk for all parties to the agreement. The Global Health Claimant Class and Fibreboard faced the real possibility that Fibreboard would be insolvent simply on the basis of claims already settled. The Insurers, on the other hand, faced the possibility of virtually unlimited liability for damage caused by Fibreboard asbestos. This pressure, felt by all parties to the global settlement, is what finally brought them together on the eve of the coverage case appeal. The unique risks posed by the coverage cases distinguish *Ahearn* from a blatant attempt to circumvent the Bankruptcy Code such as occurred in *Keene*.

The facts of *Keene* further distinguish it from our case. First, an already weak Keene attempted to avoid impending bankruptcy by asking the court to coerce its tort victims to settle claims in a court where no claims

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14 **Notwithstanding the *Keene* court's gratuitous discussion of its concerns about use of a class action to circumvent bankruptcy laws, the court's holding is that the case was properly dismissed because the plaintiff-manufacturer had no cognizable claim against the defendant class members. *Keene*, 14 F.3d at 733.**

were filed against Keene. Second, Keene attempted to utilize the 23(b)(1)(B) injunction to halt pending actions in other courts. Third, and most importantly, Keene's complaint was dismissed on the ground that it failed to present the court with any case or controversy because it requested only that the court compel all plaintiffs in suits against Keene to appear and negotiate.

Ahearn by comparison, presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims. *Ahearn* presents no danger that Fibreboard may simply be abusing this proceeding to delay other actions or to improve its negotiating position with present claimants because it only enjoins future proceedings, not those already pending. We agree with the *Keene* court that under the facts presented to it, a 23(b)(1)(B) action was not appropriate. We also agree that, in the vast majority of cases, the Bankruptcy Code should govern the distribution of an insolvent entity's assets. However, where concerns such as the risk of an adverse judgment in the coverage litigation support an early resolution of the claims against an entity and all parties can benefit from a settlement under Rule 23(b)(1)(B), we see no legal or policy reason to deny the parties this benefit. The essential basis of any settlement is to avoid the uncertainty, risks, and expense of ongoing litigation. In our case, the risks facing Fibreboard, the Insurers, and the health claimants as a result of the California coverage litigation were real and enormous. Holding that the bankruptcy laws require the parties to wait until catastrophe befalls one or more of them as a result of the California litigation would be a denial of justice to the parties before us and unwarranted by the law.

The intervenors' argument that all 23(b)(1)(B) limited-fund actions based on the insolvency of the defendant are improper ignores the special circumstances presented by *Ahearn* and certifications by other courts. In light of the *Findley* and *Drexel* decisions, also from the

Second Circuit, which allow 23(b)(1)(B) actions where the defendant's insolvency creates a limited fund, we decline to read *Keene* so broadly as to bar all such 23(b)(1)(B) settlements.

The plain meaning of Rule 23 also supports a finding that the insolvency of a defendant can support a 23(b)(1)(B) class action. The rule clearly does not distinguish between limited funds which assume insolvency of the defendant and limited funds such as proceeds of an insurance policy which constitute the entire fund from which plaintiffs may recover. It allows class actions whenever "the prosecution of separate actions by or against individual members of the class would create a risk of . . . (B) adjudications with respect to individual members of the class which would as a practical matter . . . substantially impair or impede their ability to protect their interests." Fed.R.Civ.P. 23(b)(1). Insolvency of the defendant undoubtedly impairs the ability of latecomers to receive full payment for their claims and was explicitly considered by the Advisory Committee in proposing the rule in its current form. In its Note to the 1966 Amendment to Rule 23, the Advisory Committee concludes that a limited-fund class action is appropriate in actions by creditors "when the debtor's assets are insufficient to pay all creditors' claims." Fed.R.Civ.P. advisory committee's note. This explicit reference to use of a 23(b)(1)(B) action when the debtor is insolvent offers further support for the proposition that insolvency is an appropriate basis for a limited-fund class action.

Further, the express language of the Rule compels a flexible construction. Rule 23(b)(1)(B) authorizes class certification where there is a "risk" that separate adjudications "as a practical matter" would "substantially impair or impede" the interests of the class. The rule does not require proof to a certainty that the defendant faces insolvency.

The Bankruptcy Code allows courts to dismiss or suspend bankruptcy proceedings where superior alternatives to the code are available. See 11 U.S.C. § 305(a)(1). This concession to the possibility of other proceedings to distribute an insolvent debtor's assets reveals that Congress understood that, at least some of the time, the terms and principles of the Bankruptcy Code would be circumvented by debtors and creditors who found superior methods of asset distribution. See also H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1978), U.S. Code Cong. & Admin.News 1978, pp. 5787, 6281.

Ahearn presented the district court with a superior alternative to the Bankruptcy Code and did so long before any bankruptcy court would have had jurisdiction over Fibreboard's assets. Indeed, one of the most important facts of this case is that, in spite of the threat posed by future personal injury litigation, Fibreboard is currently solvent and healthy. In the short term, no trade or tort creditor has the ability or the incentive to force Fibreboard into a Chapter 11 reorganization. It is also clear that shareholders and management, who stand to lose equity and/or employment if Fibreboard enters bankruptcy proceedings, will refuse to file a voluntary petition at least until the coverage dispute is resolved against it. That, of course, would be too late for the Global Health Claimant Class.

Even in the unlikely event that Fibreboard could be persuaded to file a voluntary bankruptcy petition, the Global Health Claimant Class would be worse off than it is under the Global Settlement Agreement. Under the Bankruptcy Code, representation for the class may not be available at all and courts that have allowed representation of future tort claimants have left them in an uncertain position that falls short of full "creditor" status.[15] Additionally, full-blown bankruptcy proceedings

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[15] See *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984); *In re*

(concluded on page A-42)

would bring in all of Fibreboard's other creditors and impose large transactions costs on Fibreboard that, ultimately, would come out of any distribution. See Edward I. Altman, *A Further Empirical Investigation of the Bankruptcy Cost Question*, 39 J.Fin. 1067, 1077 (1984). In stark contrast to the uncertain and weak position afforded future tort claimants under the Bankruptcy Code, the plaintiff class and its representatives in *Ahearn* had center stage and ran no risk of encountering a cram-down reorganization approved only by trade creditors and rammed through over the objections of class representatives.

To the extent intervenors are arguing that certification is improper because Fibreboard fares better under the class action settlement than under a bankruptcy proceeding, we find their focus misplaced. The inquiry instead should be whether the class is better served by avoiding impairment of their interests. Fibreboard is clearly acting in its own interest in consummating the Global Settlement Agreement and thereby avoiding future insolvency. But the Global Settlement Agreement also serves the interests of the Global Health Claimant Class. Early settlement allows the class to recover far more as a group than it could if it was forced to wait until Fibreboard enters bankruptcy on its own and encounters the high transaction costs of insolvency. See Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L.Rev. 8846, 851-64, 905-17 (1984) (advocating early reorganiza-

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(*continued from page A-41*)

UNR Indus., 29 B.R. 741, 745 n.4 (Bankr. N.D. Ill. 1983). The inability or refusal of the bankruptcy courts to place Global Health Claimant Class members on equal footing with other creditors of Fibreboard and the indeterminance of the "party in interest" categorization that the class would receive if its claims were cognizable at all in bankruptcy have been widely criticized. See e.g. Anne Hardiman, *Toxic Torts and Chapter 11 Reorganization: The Problem of Future Claims*, 38 Vand. L.Rev. 1369, 1395-96 (October 1985); Kevin H. Hudson, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 Emory L.J. 665, 693-95 (Spring 1991).

tions because they avoid the waste of insolvency and distribute more to victims, but noting that no one with the ability to push the mass tortfeasor into an early reorganization has the incentive to do so). Precisely because it avoids the enormous transactions costs of litigation and insolvency, the Global Settlement Agreement can offer a deal from which all parties gain. Members of the Global Health Claimant Class receive more money in payment for their injuries and Fibreboard's shareholders keep their stake in a viable entity. The only loser under the Global Settlement Agreement is the asbestos litigation industry.

For all of these reasons, we find that the district court's decision to certify *Ahearn* as a 23(b)(1)(B) class action is an appropriate interpretation of Rule 23 that does not conflict with the Bankruptcy Code and upholds the principles of equity and fairness.

2. Jurisdictional and due process considerations in 23(b)(1)(b) class actions

The intervenors next argue that the district court cannot exercise jurisdiction over class members who do not have minimum contacts with the Eastern District of Texas and that due process requires that Global Health Claimant Class members be allowed to opt out of the class. Both of these arguments are based on language from the Supreme Court decision *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). In *Shutts*, the Supreme Court held that a Kansas state court could bind absent plaintiff members of the class in a "common question" class action brought under a state rule virtually identical to 23(b)(3) only if the plaintiffs were provided with "minimal procedural due process protection," including the right to opt out. *Id.* at 811-12, 105 S.Ct. at 2974. However, the Court specifically limited its holding to

> class actions which seek to bind *known* plaintiffs concerning claims *wholly or predominantly for money judgments*. We intimate no view concern-

> ing other types of class actions such as those seeking equitable relief.

Id. at 811 n. 3, 105 S.Ct. at 2974 n. 3 (emphasis added).

The limitation of *Shutts* to claims of known plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs. See Newberg & Conte, *1 Newberg on Class Actions* § 1.18.

Class actions date back to the English common law where chancery courts used bills of peace to bind entire classes. Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L.Rev. 1297 (1932). The traditional limited-fund class action is an equitable and unitary disposition of a fund too small to satisfy all claims. See Fed.R.Civ.P. 23 advisory committee's note. Unitary adjudication of a limited fund is crucial because allowing plaintiffs to sue individually would make the litigation "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest." *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977). Limited-fund class actions effect a pro-rata reduction of all claims in order to treat all claimants fairly. Thus, they sound in equity even though the relief they provide necessarily affects the amount of money damages that claimants can ultimately receive. *In re Joint Eastern & Southern Dist. Asbestos Litigation (Findley)*, 78 F.3d 764, 776-77 (2d Cir. 1996); Newberg and Conte, *1 Newberg on Class Actions* § 1.18.

Due process standards for suits seeking equitable relief are set forth in *Hansberry* v. *Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940) where the Supreme Court stated:

> this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the

> interests of absent parties who are to be bound by it.

Id. at 42, 61 S.Ct. at 118. See also *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73 (citing Hansberry in its description of due process requirements for traditional class actions). The rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by *Shutts*. Subsequent decisions have made it clear that, consistent with due process, absent parties can be bound by a judgment where they were adequately represented in a prior action. *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2, 109 S.Ct. 2180, 2184 n.2, 104 L.Ed.2d 835 (citing *Hansberry* and Fed.R.Civ.P. 23).

Actions under Rule 23(b)(1)(B) are precisely the type of limited circumstances noted by *Martin* where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected." Newberg and Conte, *1 Newberg on Class Actions* § 1.22 at 1-51. As a result, due process requires only that all parties bound by the Global Settlement Agreement were adequately represented. We have already concluded that they were.[16]

The intervenors object that some members of the class may not have minimum contacts with the Eastern District of Texas and have not otherwise consented to the district court's jurisdiction. They also claim that the

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16 Opt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action. The intervenors would have us read *Shutts* to mean that all class actions involving money claims under Rule 23(b)(1) or (2) are unconstitutional. If the Supreme Court had intended to so hold, it surely would have been more explicit given the ancient history of the mandatory class action, over a hundred years of precedent upholding the constitutionality of such classes, the relatively recent development of the "opt-out" class action, and the strong presumption that the Federal Rules of Civil Procedure are constitutional.

Global Settlement Agreement is without authority to release future claims that have not yet accrued. These objections again ignore the equitable nature of this action.

Due process requires adequate representation in a 23(b)(1)(B) case but, as *Shutts* expressly cautioned, minimum contacts or consent to jurisdiction are not necessary in equitable class actions. Newberg and Conte, *1 Newberg on Class Actions*, § 1.20 ("Minimum Contacts Jurisdiction Not Required for Members of Equitable Class Suits") and § 1.21 ("Opt-Out Rights or Implied Consent of Members Not Required for Jurisdictional Due Process in Equitable Class Suits"). It is also well settled that a unitary adjudication of a limited fund binds future, contingent, and unknown claimants who, by definition, could not give consent to jurisdiction. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Rule 23(b)(1)(B) actions closely resemble actions for interpleader, or for the accounting of a trustee. See *Mullane*, 339 U.S. at 311-13, 70 S.Ct. at 655-57; *In re Joint Eastern and Southern Dist. Asbestos Litigation (Findley)*, 878 F.Supp. 473, 478, 562 (E. & S.D.N.Y. 1995); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y. 1990). Cf. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir. 1982). This is because all claimants will recover from the fund or not at all. This view of a limited-fund class action as similar to an action in rem makes particular sense because, although limited-fund actions often involve unknown or unavailable claimants who cannot expressly consent to jurisdiction, the court in such an action has before it for disposition all the assets in which class members could claim an interest. See e.g., *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation (Eagle-Picher)*, 134 F.R.D. 32, 38 (E. & S.D.N.Y. 1990); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977).

The court can appropriately adjudicate all claims against the fund because of its jurisdiction over the fund and the fact that all potential claimants are adequately represented before it. *Smith* v. *Swormstedt*, 57 U.S. (16 Howard) 288, 302, 14 L.Ed. 942 (1853).

Finally, the intervenors complain that the Global Settlement Agreement purports to release claims which do not present "a case or controversy." This misconstrues the nature of the settlement which does not purport to make any determination of the validity or amount of individual personal injury claims against Fibreboard. What the settlement does is address the immediate and important controversy of whether future claimants will be able to receive compensation for their injuries before Fibreboard runs out of money. It resolves this controversy by settling the insurance coverage litigation, capping the amount recovered by individual plaintiffs at $500,000, prohibiting punitive damage awards, and limiting the amount that the Global Trust can pay out in any given year. These provisions are designed to ensure that latecomers do not find their claims impaired because the winners of the race to the courthouse have claimed all of Fibreboard's assets in the early rounds of individual litigation. The argument that plaintiffs who have already been exposed to asbestos have no justiciable interest in ensuring that funds remain available to compensate them when they contract asbestos-related diseases is not supportable and has been widely rejected. See *In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984); *Carlough* v. *Amchem Products, Inc.*, 10 F.3d 189, 196 n.4 (3d Cir. 1993). The intervenors' objection is meritless.

The district court properly found that Fibreboard is a limited fund which will be depleted to the detriment of latecomers if claims are litigated on an individual basis. Due process requires that class members in *Ahearn*, an equitable class action for a pro-rata distribution of a limited fund, receive adequate representation by class

representatives with similar interests. The district court did not abuse its discretion in finding that these requirements were met and certifying this suit as a Rule 23(b)(1)(B) class action.

C. OTHER OBJECTIONS

1. "Friendly" suit

The intervenors assert that *Ahearn* was a collusive or "friendly" suit in contravention of the "case or controversy" requirement of Article III in the Constitution. Specifically, the intervenors allege that (1) there was no real conflict between the parties because the complaint and settlement were filed the same day and class representatives never intended to litigate the claims alleged in the complaint, and (2) the defendants handpicked the plaintiffs' attorneys. These arguments fail because they conflict with relevant caselaw and do not address the district court's findings of fact regarding the non-collusive nature of the settlement negotiations. The intervenors also ignore the adversarial positions which the parties occupied before settlement negotiations and the positions to which they will return if the settlement is not approved.

A "case or controversy" under Article III requires that the parties be truly adverse. *United States* v. *Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943). This requires a continuing controversy, *Preiser* v. *Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334, 45 L.Ed.2d 272 (1975), and an "honest and actual antagonistic assertion of rights." *Johnson*, 319 U.S. at 305, 63 S.Ct. at 1076 (quoting *Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345, 12 S.Ct. 400, 402, 36 L.Ed. 176 (1892)).

The parties in *Ahearn* filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint so they clearly did not intend to litigate the complaint. However, this does not change the adversarial nature of the disputes which the settlement

resolves and does not contradict the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length. The intervenors are apparently asking us to hold that the suit is either moot or collusive simply because it was filed at the same time as a settlement requiring court approval. Neither of these conclusions is supportable.

The Supreme Court has stated that the existence of a proposed settlement does not render an action moot where judicial approval of the settlement is required before the settlement will bind the parties. *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 n.10, 102 S.Ct. 1114, 1120 n.10, 71 L.Ed.2d 214 (1982). *Ahearn* was a class action that could not be settled without court approval so the parties' agreement to settle the case did not make it moot.

The other finding suggested by the intervenors, that the suit is collusive simply because the parties have resolved their differences and seek only the judicial approval required by Rule 23(e), is equally unsupportable and has also been rejected. See *Carlough* v. *Amchem Products*, 10 F.3d 189, 201 (3d Cir. 1993) (adopting the reasoning of the district court's October 6, 1993 opinion in *Carlough* v. *Amchem Products, Inc.*, 834 F.Supp. 1437, 1465 (E.D. Penn. 1993)); *In re Joint Eastern and Southern District Asbestos Litigation (Findley)*, 982 F.2d 721, 728 (2d Cir. 1992) (complaint and settlement filed the same day); *S.E.C.* v. *Randolph*, 736 F.2d 525 (9th Cir. 1984) (controversy exists even though settlement and complaint were filed the same day).

The district court found that the *Ahearn* complaint and proposed settlement were not collusive. The intervenors' assertions to the contrary have no support in the record. The district court found that the negotiation process was slow, contentious and fraught with disagreements on serious issues. Its exhaustive findings of fact detail the parties' initial positions and their slow

movement toward a settlement that offers a fair compromise of their various claims.

The complaint that Fibreboard handpicked the plaintiffs' attorneys is equally without merit and tells only part of the story. The record shows that Fibreboard did approach the attorneys to negotiate a global settlement but the intervenors fail to include important details such as (1) the plaintiffs' lawyers involved in the negotiations have extensive experience in asbestos litigation, and (2) the district court found that the plaintiffs' lawyers vigorously represented their clients' position. We have already concluded that the Global Health Claimant Class was adequately represented by qualified attorneys. The fact that Fibreboard initiated negotiations with a group of highly experienced, top-notch plaintiffs' attorneys in order to craft a global settlement suggests that Fibreboard wanted a fair settlement that a court was likely to approve.

2. Recusal of Judge Parker

The Flanagan intervenors appeal from Judge Steger's order in the district court denying their motion to recuse Judge Parker. They argue that Judge Parker should not have mediated the settlement and then conducted a fairness hearing on the same settlement. We review Judge Steger's decision for abuse of discretion. *In re Hipp*, 5 F.3d 109, 116 (5th Cir. 1993).

A judge must disqualify himself under § 455 if his impartiality "might reasonably be questioned." 28 U.S.C. § 455. The standard for determining impartiality depends on the source of the judge's alleged prejudice. To the extent that a judge has become biased due to facts he has learned during a judicial proceeding, he must recuse himself only if fair judgment would be impossible. *Liteky* v. *United States*, 510 U.S. 540, ___, 114 S.Ct. 1147, 1157, 127 L.Ed.2d 474 (1994). If the alleged partiality stems from a source other than a judicial proceeding, a judge must recuse himself if "a reasonable

and objective person, knowing all of the facts, would harbor doubts concerning the judge's partiality." *United States* v. *Jordan*, 49 F.3d 152, 155 (5th Cir. 1995).

Judge Parker's role in the negotiating process was insubstantial and stemmed from three cases filed in his court. His actions were limited to appointing Judge Patrick E. Higginbotham of this court as a settlement facilitator, appointing class counsel for the Global Health Claimant Class at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening. After the parties agreed to a settlement, Judge Parker held an extensive fairness hearing and appointed an independent guardian ad litem to report on the fairness of the settlement to the futures class.

Judge Steger found that "[o]n the basis of the entire record and taking all of Mr. Jaques' allegations as true, . . . no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality."[17] Our review of the record confirms that Judge Parker carefully avoided any appearance of impropriety. The district court did not abuse its discretion in denying the motion to recuse.

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17 The district court also rejected the intervenors' motion under 28 U.S.C. § 144. This statute requires that a party submit an affidavit alleging facts that, if true, would convince a reasonable person that bias exists. However, "[a] court may not grant relief under § 144 if a party's counsel instead of the party executes an affidavit alleging personal bias or prejudice." *Pomeroy* v. *Merritt Plaza Nursing Home, Inc.*, 760 F.2d 654, 658-59 (5th Cir. 1985) (citations omitted). The only affidavit before the district court was submitted by counsel for the Flanagan intervenors, Leonard Jacques, and therefore did not qualify for relief under § 144. The district court's error in considering the recusal motion under § 144 was harmless in any event because the court properly concluded that even if the facts in the affidavit were assumed true, a reasonable person would find that no bias exists.

3. Plant Insulation Company

Plant Insulation Company, a member of the Global Third-Party Claimant Class, argues that its due process rights were violated because it was not allowed to opt out of that class. Plant did not attempt to intervene in the proceeding before the district court so it has no standing to appeal the district court's ruling. The Fifth Circuit has held that "non-named class members do not have standing to appeal the final judgment in a class action . . . ." *Walker* v. *City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988). As a result, "we have no jurisdiction to consider an appeal by a class member who has not attempted to intervene as a named party." *Loran* v. *Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993). See also, *Edwards* v. *City of Houston*, 78 F.3d 983 (5th Cir. 1996) (en banc) (unions had no standing to appeal the court's final judgment because they never became named parties or intervenors in the suit). Accordingly we dismiss Plant's appeal for lack of standing.[18]

4. Other objections of the *Flanagan* intervenors

The Flanagan intervenors raise several more objections common to *Ahearn* and *Rudd*. They argue that merchant mariners are differently situated from other members of the Global Health Claimant Class because of differences between admiralty law and the tort law of

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18 Two other would-be appellants also lack standing under this rule. However, we need not dismiss their appeals for lack of standing because they are dismissed on other grounds.

On March 25, 1996, Jeffrey Mack Chapin filed notices of appeal complaining of orders entered in *Ahearn* and *Rudd*. These notices of appeal which were consolidated into *Ahearn* and *Rudd* were untimely and are therefore dismissed.

Kenneth Smith has also filed notices of appeal complaining of the orders in *Ahearn* and *Rudd*. Smith's notices of appeal have also been consolidated into *Ahearn* and *Rudd* and are dismissed due to Smith's failure to pay the docketing fee and failure to file an appellate brief.

some states. This argument ignores the fact that the Global Settlement Agreement allows claimants the same rights they would receive in the tort system (limiting only the amount of total damages and punitive damages). Admiralty law will provide the backdrop for any maritime plaintiff's settlement because that law will govern the trials of maritime plaintiffs who choose the back-end opt-out provision.

Finally, the *Flanagan* intervenors claim that the district court improperly used defendant classes. They argue that defendant classes are only appropriate in cases where defendants are guilty of egregious misconduct. This argument has no support in the language of Rule 23 and is contrary to a wide range of cases where courts have certified defendant classes without requiring a "widespread pattern of wrongful conduct." See e.g., *Blake* v. *Arnett*, 663 F.2d 906, 911-13 (9th Cir. 1981) (defendant class of Yurok Indians on counterclaims seeking declaration eliminating alleged Indian treaty rights in land held by lumber and mining company); *Board of Regents of University of Nebraska* v. *Dawes*, 522 F.2d 380, 381 (8th Cir. 1975) *cert. denied*, 424 U.S. 914, 96 S.Ct. 1112, 47 L.Ed.2d 318 (1976) (defendant class of employees allegedly discriminated against by plaintiffs); *Garneau* v. *City of Seattle*, 897 F.Supp. 1318, 1320 (W.D. Wa. 1995) (defendant class of low-income tenants seeking relocation assistance from plaintiffs); *Houston Chapter of the Int'l Ass'n of Black Professional Firefighters* v. *Houston*, 1991 WL 340296, at *3, *28 (S.D. Tex. May 3, 1991) (defendant class of present and future non-black, non-Hispanic firefighters who will be eligible for certain ranks in the Houston Fire Department).[19]

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19 The *Flanagan* intervenors also argue that claims which Fibreboard already knew about (those of Mr. Jaques' clients) cannot be

(*concluded on page A-54*)

III.
RUDD

In addition to the claims addressed above, the *Flanagan* intervenors make several objections specific only to *Rudd*.[20]

A. FIBREBOARD AS AN INDISPENSABLE PARTY

The *Flanagan* intervenors argue that the *Rudd* action must be dismissed for lack of an indispensable party, Fibreboard.[21] Although they failed to raise this issue in

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(*continued from page A-53*)

"future claims" simply because they were not filed before the settlement was reached. This objection is asserted without any basis in law and fails to explain how claims which have not yet been filed could be anything other than "future claims" in the eyes of a court.

The *Flanagan* intervenors also claim that they are appealing the judgment entered in *Ahearn* which approves the Trilateral Settlement Agreement as a fair settlement of the coverage litigation between Fibreboard and the Insurers. However, Flanagan failed to raise this issue in his initial brief and has not demonstrated that he has standing to challenge this judgment. On appeal, this court will not reach issues not raised in the initial brief. *United Paperworkers Intern. U.* v. *Champion Intern.*, 908 F.2d 1252, 1255 (5th Cir. 1990). Additionally, Flanagan has failed to demonstrate (or make any argument) that he is a proper party to appeal the judgment approving the fairness of the settlement of the coverage litigation between Fibreboard and the Insurers. See *Rohm & Hass Tex.* v. *Ortiz Bros. Insulation*, 32 F.3d 205 (5th Cir. 1994).

20 The *Flanagan* intervenors argue that *Rudd* was inappropriately certified as a 23(b)(1)(B) class. We do not consider the merits of this argument because the district court found, and we agree, that the defendant class in *Rudd* could also be certified under 23(b)(2). None of the intervenors appeals the propriety of certification under this provision.

21 Rule 19(b) requires a district court deciding the question of indispensability to consider:

(*concluded on page A-55*)

the district court, we may still consider it on appeal. *United States* v. *Sabine Shell, Inc.*, 674 F.2d 480, 482 (5th Cir. 1982). However, "failure to raise the issue of joinder until this appeal mitigates against a finding in their favor." *Id.* at 483. We agree with the Ninth Circuit that "when the judgment appealed from does not in a practical sense prejudicially affect the interests of the absent parties, and those who are parties have failed to object to non-joinder in the trial court, the reviewing court will not dismiss an otherwise valid judgment." *Sierra Club* v. *Hathaway*, 579 F.2d 1162, 1166 (9th Cir. 1978), cited with approval in *McCulloch* v. *Glasgow*, 620 F.2d 47, 51 (5th Cir. 1980). See also *Judwin Properties Inc.* v. *United States Fire Insurance Co.*, 973 F.2d 432, 434 (5th Cir. 1992) and *Sabine Shell*, 674 F.2d at 483.

Both the Trilateral Health Claimant Class and the Trilateral Third-Party Claimant Class agreed to a consent judgment sought by the Insurers declaring approval of the Trilateral Settlement Agreement and the release of the Insurers. Because Fibreboard has already consented to entry of a similar release of the Insurers in *Ahearn*, the *Rudd* judgment does not prejudicially affect Fibreboard. Thus, *Rudd* should not be dismissed for want of an indispensable party.

(*continued from page A-54*)

> **first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.**
>
> **Fed.Rule Civ.Proc. 19(b).**

B. JUSTICIABILITY OF THE RUDD CLAIM

The *Flanagan* intervenors argue that the *Rudd* complaint fails to state a cause of action or a "case or controversy." The Insurers in *Rudd* seek declaratory and injunctive relief determining that (1) the Trilateral Settlement Agreement is fair, reasonable, and negotiated at arm's length in good faith; (2) the defendant classes approve of the Trilateral Settlement Agreement and the release of the Insurers; and (3) the defendant classes be enjoined from asserting future claims against the Insurers.

The Declaratory Judgment Act does not expand the jurisdiction of the federal courts. See *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72, 70 S.Ct. 876, 878-79, 94 L.Ed. 1194 (1950). Similarly, it does not create substantive rights; it is only a procedural device that enhances the remedies available in the adjudication of a case or controversy. See *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240, 57 S.Ct. 461, 463-64, 81 L.Ed. 617 (1937).

A justiciable case or controversy exists as long as the court's ruling will affect "tangible legal rights." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 619, 109 S.Ct. 2037, 2046-47, 104 L.Ed.2d 696 (1989). In *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 61 S.Ct. 510, 85 L.Ed. 826 (1941), the Supreme Court stated that "[b]asically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 273, 61 S.Ct. at 512.

In *Rudd*, the Insurers seek a declaratory judgment that because the Trilateral Settlement Agreement is fair and negotiated in good faith, it cuts off all rights of both Trilateral Health Claimants and Trilateral Third-party Claimants to payments under the policies. The Insurers were justifiably concerned that after they

spend $2 billion on the Trilateral Settlement with Fibreboard, the settlement could be challenged by asbestos victims and third-party claimants, particularly if Fibreboard becomes insolvent. The Insurers in *Rudd* sought to cut off this potential challenge by obtaining the declaratory and injunctive relief described above.

Many states recognize that a tort victim injured during the policy period has sufficient legal interest in that policy to attack subsequent changes that affect the right to recover — i.e., reformation, cancellation, or settlement of the policy. See, e.g., *Maryland Casualty Co.*, 312 U.S. at 273-74, 61 S.Ct. at 512-13 (a tort victim has a potential financial interest in the insurer's insurance policy, and the impairment of this interest is an injury that will support standing under Article III); *Bankers Trust Co.* v. *Old Republic Insurance Co.*, 959 F.2d 677, 682 (7th Cir. 1992) ("the victim of an insured's tort, even though he is not a third-party beneficiary of his insurer's insurance policy, has a legally protected interest in that policy before he has reduced his tort claim to judgment"). Some states even require the injured party to be included in any negotiations of policy changes that will affect their rights. See e.g., *Smith & Wesson* v. *Birmingham Fire Ins. Co.*, 123 A.D.2d 135, 510 N.Y.S.2d 606, 608 (1st Dept. 1987); *Maryland Cas. Co.* v. *Wilson*, 6 Ariz.App. 470, 433 P.2d 650, 652 (1967); *Shapiro* v. *Republic Indem. Co.*, 52 Cal.2d 437, 341 P.2d 289, 290 (1959); *Womack* v. *Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 236 (1956). Thus, the Insurers faced a substantial threat of collateral attacks from members of both the Trilateral Health Claimant Class and the Trilateral Third-party Claimant Class asserting that the Trilateral Settlement was unfair or fraudulent. A true controversy existed.

The *Flanagan* intervenors also argue that the Trilateral Settlement Agreement is effective only if the *Ahearn* settlement is rejected. Flanagan argues that this contingency precludes a finding that *Rudd* is an adjudication

of a "present right upon established facts." *Brown & Root, Inc.* v. *Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967).

The Trilateral Settlement Agreement contains provisions that become operative regardless of whether the Global Settlement Agreement is ultimately approved or disapproved; for example, the parties agree in the Trilateral Settlement Agreement to compromise all Fibreboard's claims under the insurance policies not previously released, including claims for property damages. The Global Settlement Agreement only refers to personal injury claims filed against Fibreboard after August 27, 1993. Therefore, the effectiveness of the Trilateral Settlement Agreement is not wholly contingent on the outcome in *Ahearn*.

Moreover, the case would be ripe even if the effectiveness of the Trilateral Settlement Agreement were wholly contingent upon the disapproval of the Global Settlement Agreement. In *Chevron U.S.A., Inc.* v. *Traillour Oil Co.*, 987 F.2d 1138 (5th Cir. 1993), we found a case would be ripe for adjudication notwithstanding the existence of some contingency to the claim if either (1) there is "a substantial possibility" that the contingency will occur, or (2) the only questions being presented "are purely legal ones." *Id.* at 1154. We found judicial resolution of contingent claims is consistent with the purpose of the Declaratory Judgment Act which is "to settle actual controversies before they ripen into violations of law or breach of some contractual duty." *Id.* (quoting *Hardware Mutual Casualty Co.* v. *Schantz*, 178 F.2d 779, 780 (5th Cir. 1949)).

In *Rudd*, the contingency that the global settlement might not receive court approval or might be successfully attacked was a substantial possibility; the global settlement was an innovative approach to unique circumstances. The parties to *Ahearn* had no assurance that a court would accept this settlement which is the reason the *Ahearn* plaintiffs insisted on a back-up agree-

ment to settle the coverage issue. Thus, we agree with the district court that the *Rudd* complaint presented a justiciable claim.

CONCLUSION

Although appellants' arguments challenging the approval of the global settlement are not insubstantial, on the unique facts presented here they do not carry the day. The global settlement was driven by insurance coverage litigation between Fibreboard and the Insurers which would have been catastrophic for whomever was on the losing side. None of the parties was prepared to take the enormous risk inherent in that litigation. The global settlement offers all sides the best solution possible by eliminating costly disputes between Fibreboard, its insurers, and asbestos claimants and ensuring an equitable distribution to asbestos claimants. The $1.5 billion global settlement was a major accomplishment by all parties concerned and no one seriously challenges its adequacy or the desirability of avoiding another bankruptcy of a vigorous American company.

For the reasons stated above, we conclude that in this case none of the legal impediments argued by appellants precluded the district court from approving the global or trilateral settlements. Both settlements were legally sound resolutions of serious disagreements. The judgment of the district court is

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

I.
INTRODUCTION.

The district court and the majority undoubtedly are driven by a commendable desire to resolve voluminous personal injury claims against an otherwise strong American company and to ensure an orderly transfer of

funds from the company's insurers to its victims. In order to accomplish this result, however, they have extinguished claims over which they have no jurisdiction and deprived thousands of asbestos victims of basic constitutional rights. The result is the first no-opt-out, mass-tort, settlement-only, futures-only class action ever attempted or approved.

Ironically, the willingness to jettison centuries-old legal precepts hurts the very victims they intend to help: The settlement forces asbestos victims to surrender their claims in exchange for a meager $10 million of Fibreboard's $225-250 million net worth. They also benefit from Fibreboard's settlement with its insurers, but Fibreboard and the insurers had powerful incentives to settle that dispute by themselves; in fact, they did so for $2 billion.

There was no need even to involve the class in those negotiations, much less to sacrifice its interests. "Thus, the class members appear to have traded Fibreboard's liability for nothing to which they did not already have a right."[1]

On the other hand, the district court and the majority have bailed Fibreboard's shareholders out of a mammoth liability and awarded $43.7 million to class counsel. This suit was supposedly brought on behalf of Fibreboard's victims, but of the four entities directly affected by the settlement — Fibreboard, class attorneys, courts, and asbestos victims — the victims were the only entity absent from the bargaining table. Perhaps for that reason, they also were the only losers.

How could well-intentioned judges sanction — indeed, compel — such an untoward result? Apparently this is simply a case of judges — both trial and appellate — trying too hard to solve the vexing problems posed by

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[1] John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L.REV. 1343, 1420 (1995).

unending asbestos litigation. Having certified at least two other high-profile asbestos class actions,[2] then-Chief District Judge Parker was acutely aware of the problems posed by asbestos litigation. In the end, he appears to have become too close to both the overall problem and the instant settlement to continue to act in a judicial capacity in this case.[3]

When Fibreboard and class counsel announced at a court hearing that they had reached a settlement, Chief Judge Parker referred to "extensive negotiations between counsel that the Court has participated in." Also at that time, and long before the fairness hearing, he said, "We will trust in the scholarship, the good judgment and common sense of the . . . courts of appeal in the event this comes to their attention." In short, Chief Judge Parker tried his best to solve a perplexing problem, and it is our task to figure out whether that solution is legally sustainable.

There are two primary problems: (1) Fibreboard, class counsel, and Fibreboard's other creditors have combined to profit at the expense of absent class members; and (2) this case is an affront to the integrity of the judicial system. As we observed when reversing Chief Judge Parker's certification of another class action against Fibreboard: "The Judicial Branch can offer the trial of lawsuits. It has no power or competence to do more." *Fibreboard*, 893 F.2d at 712.

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2 See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (granting writ of mandamus); *Jenkins* v. *Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986) (affirming certification).

3 For example, certain of the appellants make much of a gathering Chief Judge Parker arranged at his house during which, allegedly, counsel — especially the insurers' — were hounded into settling. I reach no conclusion regarding the details of this episode except that it demonstrates both that the proceedings in this case were unusual and that Chief Judge Parker was aggressively involved in the settlement.

A. IMPORTANCE AND UNIQUENESS.

This case is extraordinarily important. Prior to the filing of this suit, no one had ever attempted a no-opt-out, mass-tort, settlement-only, futures-only class action. Ever since the district court's certification order, however, corporate America has been "anxiously awaiting" a decision in this case. Richard B. Schmitt, *The Deal Makers: Some Firms Embrace the Widely Dreaded Class-Action Lawsuit*, WALL ST. J., July 18, 1996, at A1. The majority's unequivocal approval of Fibreboard's litigation strategy undoubtedly will lead "other financially threatened companies throughout the nation [to] utilize it as a road map for sheltering their assets and improperly restricting the rights of their present and future victims." Amicus Br. of Trial Lawyers for Public Justice at 2-3.

Thus, the majority's reliance upon the "unique facts" of this case, see maj. op. at 993 [A-59]*, is ironic: The unique fact of the insurance dispute is simply irrelevant, and the other unique facts — a corporate defendant's hand-picking class counsel, cutting a side deal, reaching a "global settlement" affecting only "future" plaintiffs, and choosing a sympathetic judge to approve the settlement — likely will become far too common now that the majority has approved of them. "[W]hat was meant to provide a remedy for those who would otherwise lack one, enabling them to pool their voices and finances, will become a device to take away remedies from those who could otherwise invoke them." John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L.REV. 1222, 1223 (1995).

B. THE NEED FOR PROCEDURAL PROTECTIONS.

Two primary errors led the district court and the majority astray. These are, first, underestimating the

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* **[*Printer's Note*]: Reference to the majority opinion's published pagination will be followed by bracketed reference to the pagination of this Appendix.**

importance of jurisdictional and procedural protections for absent class members, and second, departing from the judiciary's exclusive area of authority and competence — the resolution of lawsuits.

We must keep in mind that it was the defendant — Fibreboard — who selected the class that was to "sue" it and the class action lawyers who were to do the dirty work. Fibreboard hand-picked a class that was uniquely vulnerable to exploitation, class counsel who were widely reported to have sold out a similar class, and a court with a reputation for favoring a global settlement. Class counsel then cut a side deal with Fibreboard before agreeing to the class settlement, and the district judge presided at the fairness hearing on the very settlement he had helped to craft.

The settlement extinguishes claims of people over whom we lack jurisdiction, some of whom have not yet been injured and others of whom have not even been born. It also prevents such future claimants from opting out, because of a supposed need to divide a limited fund among a large number of claimants, but it grants automatic opt-outs to all those who already had filed suit. Coincidentally or not, this gerrymandered class definition includes those most vulnerable to abuse while excluding those most likely to intervene, to monitor class counsel, and to oppose the settlement.

It is fair to question for whom class counsel really worked. Fibreboard picked them, the district court approved them, the insurers paid them, and in exchange, they bailed out Fibreboard's shareholders and relieved district courts of potentially thousands of cases — at the expense of the absent asbestos victims whom class counsel purportedly represent.

> If all that was at stake for individual class members was some nominal compensation for having been charged an extra five cents on a bag of potato chips, one might not be too concerned

> with how the courts enforced class counsel's duties to these people. But often much more is at stake, such as whether a plaintiff will recover for a fatal illness caused by a defective product, and if so, how much. Today, such a person may have her rights adjudicated by a court without actual notice of the action and before she even knows she has been injured.
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> Fantastic as this may seem . . . , it is true.[4]

But it need not be. Even rudimentary constitutional protections — such as according absent class members adequate representation and adjudicating only their presently-existing, legally cognizable injuries — would have prevented Fibreboard from perpetuating this unfortunate miscarriage of justice.

C. LEGISLATED TORT REFORM.

The district court legislated a bold and novel tort reform proposal thinly disguised as the settlement of a lawsuit. Of course, there never was a lawsuit: Fibreboard and its hand-picked class counsel agreed to file a suit only if they already had settled it. Thus, Chief Judge Parker began his opinion by stating, "This action was filed to obtain judicial approval of a class settlement." *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 507 (E.D. Tex. 1995).

The class complaint alleges exposure-only claims for which the settlement provides no compensation. Class

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4 **Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 13 (1995). The *Ahearn* and *Georgine* settlements have received significant attention in the academic literature, most of it extremely negative. See, e.g., Coffee, *supra* note 1, at 1393-1404; Roger C. Crampton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L.REV. 811, 825-35 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L.REV. 1045 (1995); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L.REV. 858, 898-900 (1995).**

counsel even conceded that, as a matter of practice, they do not pursue such claims on behalf of their own clients; instead, they wait and file suit after a plaintiff actually has suffered an injury. The only reason to include those claims in the complaint was to manufacture jurisdiction over class members who have not yet manifested symptoms of asbestosis or otherwise suffered a legally cognizable injury. Even that attempt to trump up jurisdiction should fail, however, as many states do not recognize an exposure-only cause of action.

Moreover, the settlement does not resolve the rights of individual class members. The only genuinely judicial aspect of approving the settlement is the release of Fibreboard from liability to the class, or more specifically, the transfer, from Fibreboard's shareholders to its victims, of the risk that Fibreboard's insurance assets are inadequate.

The remainder of the settlement is purely legislative: Class members' causes of action are repealed in favor of the equivalent of a workers' compensation regime.[5] The Association of Trial Lawyers of America summed up this point nicely in an amicus brief opposing the settlement: "The alchemy of the [instant] settlement . . . had the effect of transforming the common law damage claims of asbestos victims, which were clearly safeguarded by the right to trial by jury, into administrative claims without that right." Amicus br. at 9.

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5 **The purported "back-end opt-out right" likely will prove to be no right at all. Before he may even file a lawsuit, a victim must (1) file a claim with the trust and wait for it to evaluate his claim; (2) engage in settlement discussions; (3) proceed to mediation; and (4) participate in non-binding arbitration.**

Even after securing a court judgment in his favor, the claimant may not enforce that judgment; instead, he must accept installment payments over a number of years. His recovery is capped at a pre—

(concluded on page A-66)

Even if exchanging state tort law for this private, alternative dispute resolution mechanism were the boon to class members that the majority holds it out to be — and I doubt that it is, see *infra* part IX — such a policy decision is "better addressed to the representative branches — Congress and the State Legislature." *Fibreboard*, 893 F.2d at 712. In addition, Fibreboard hardly deserves more than $200 million for drafting the legislation.

"[T]raditional ways of proceeding reflect far more than habit." *Fibreboard*, 893 F.2d at 710. As judges are trained and equipped to adjudicate, not legislate, it is understandable that the courts have fallen prey to powerful special interest groups — a wealthy defendant and the class action bar — and unwittingly disserved the very victims the courts were intended to help.

D. CONSTRUCTIVE BANKRUPTCY.

Nor does Fibreboard's "constructive bankruptcy" justify abridgment of absent class members' substantive state law rights. In bankruptcy, the claims of all of Fibreboard's creditors, not just its "future" personal injury victims, would be crammed-down. Permitting Fibreboard to effect a reorganization bankruptcy proceeding in the guise of a futures-only class action circumvents the detailed protections of the Bankruptcy Code for the express purpose of imposing the entire cost of the bailout on Fibreboard's most vulnerable creditors, to the betterment of its shareholders.

The Second Circuit decertified a similar settlement class for precisely that reason:

(*continued from page A-65*)

set dollar amount, and he is barred from receiving punitive damages or pre- or post-judgment interest. In short, the settlement ensures that the trust can make trial an impracticable method of recovery, forcing class members to settle within the confines of the administrative procedure devised by Fibreboard and class counsel.

> Evasion of bankruptcy is . . . not without costs or other perils . . . . [C]lass members in cases such as this would have no say in the conduct of the court-appointed class representatives and, unlike creditors in bankruptcy, are not able to vote on a settlement. For them, it would be "cram-down" from start to finish.

Keene Corp. v. *Fiorelli (In re Joint E. & S. Dist. Asbestos Litig.)*, 14 F.3d 726, 732 (2d Cir. 1993) (citation omitted). The amicus brief of the Trial Lawyers for Public Justice puts the point more forcefully: "[I]nstead of protecting class members from the risk that their ability to obtain relief from Fibreboard will be 'substantially impaired,' certification of the proposed settlement class here ensures that the class members' ability to obtain relief from Fibreboard will be totally eliminated." Amicus br. at 6.

E. CREATING A CIRCUIT SPLIT.

Our sister circuits have rejected all other actions that came even close to attempting what Fibreboard has done here. The Ninth Circuit has squarely held that opt-out rights are available in all class actions seeking predominantly monetary damages, regardless of the subsection under which they were certified. See *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), cert. dismissed, 511 U.S. 117, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994). Two other circuits appear to agree with the Ninth, and none has expressly disagreed. See *infra* note 16. Without even citing that authority, however, the majority arbitrarily limits opt-out rights to actions certified under FED.R.CIV.P. 23(b)(3), see maj. op. at 987 [A-45] n. 16, exalting an irrelevant technicality over the underlying reality and creating a circuit split in the process.

Earlier this year, the Third Circuit firmly held that class counsel cannot adequately represent both extant and latent claimants in a futures-only asbestos class

action. *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 630-31 (3d Cir. 1996). The court explained that while extant claimants — those who have already incurred injuries — desire immediate, unlimited recovery from the trust, latent claimants — those who have yet to suffer an injury — desire that recovery be capped or delayed to ensure that extant claimants will not deplete the fund. *Id.*

The majority mentions *Georgine* only in a brief footnote, distinguishing it on the ground that the *Georgine* settlement provides a detailed claims resolution schedule, while the *Ahearn* settlement does not. See maj. op. at 976 [A-22] n. 8. Class counsel still served conflicting interests, however, and postponing some distributional issues until after certification and appeal hardly makes them disappear. The majority may prefer the devil it does not know to the devil it does, but I am loath to make that decision for an entire class of people who are not even aware that we are "adjudicating" their rights.

On the other hand, the majority is correct that *Keene* is easy to distinguish, for the defendant in that action was forthright: Instead of retaining plaintiffs' counsel and having them file a complaint asserting claims they had no intention of pursuing (as occurred here), the asbestos manufacturer asked the court to oversee the negotiation of a settlement. See *Keene*, 14 F.3d at 728-29. The Second Circuit dismissed the action, finding that "it is a self-evident evasion" of the Bankruptcy Code, "the exclusive legal system established by Congress for debtors to seek relief." *Id.* at 732. Future defendants presumably will draw one of two conclusions: Involve the court as little as possible in settlement class actions, or file in the Fifth Circuit.

In sum, the settlement fails either a customary legal analysis or a common-sense smell test. I respectfully but vehemently dissent from all but part III of the majority opinion.

II.
FACTS AND PROCEDURAL HISTORY.

Though the background to this case is somewhat complicated, the key facts are hard to overlook. Fibreboard approached four plaintiffs' lawyers, including Ron Motley and Joe Rice, and suggested that they negotiate a "global settlement" of all of Fibreboard's asbestos liabilities. The negotiations initially failed, perhaps because of the massive scope of the undertaking.

Fibreboard then adopted a risky strategy of assigning claims against its insurers in settlement of individual suits. The danger was that these settlements arguably violated the insurance policies. Fortunately for Fibreboard, a California court approved the deals.

Then something odd happened: Fibreboard settled a large number of cases with Ness Motley — Motley and Rice's law firm — by assigning insurance assets, and brought an action in the Eastern District of Texas seeking approval of the settlement. Why would Fibreboard, a California company, roll the dice in Texas when it had already won in California? Because something important had happened in Pennsylvania.

The Judicial Panel on Multidistrict Litigation had transferred all pending asbestos cases not yet on trial to a district court in Pennsylvania. See *Georgine* v. *Amchem Prods.*, 83 F.3d 610, 619 (3d Cir. 1996). Then-Chief Judge Robert Parker of the Eastern District of Texas wrote a letter to the transferee judge, telling him that he (the Pennsylvania judge) was "the Eisenhower of this D-Day operation" and encouraging him to prod the parties to a global settlement. See Coffee, *supra* note 1, at 1390.

When the plaintiffs' steering committee rejected such a proposal, twenty defendants approached a minority faction of the committee — Motley and Gene Locks — and reached a global settlement with them. See *Id.* at 1391-92, 1457. Actually, they made a series of deals: a

class action settlement for future asbestos victim claimants and separate settlements for the lawyers' pre-existing, individual clients.

The separate settlements were significantly more lucrative than the class one. See *Id.* at 1392-93; Koniak, *Feasting*, *supra* note 4, at 1052. In fact, Motley received fifty percent more for his own clients than he did for those in the class. See Coffee, *supra* note 1, at 1397; Koniak, *Feasting*, *supra* note 4, at 1067. The Third Circuit rejected the settlement, finding that class counsel — including Motley — were hopelessly conflicted. See *Georgine*, 83 F.3d at 630-31.

As the *Georgine* negotiations concluded, Fibreboard and Ness Motley settled a number of cases and, as noted above, filed an action in Chief Judge Parker's court. Fibreboard thereby secured class counsel with a track record of making global settlements and a judge with a demonstrated commitment to them.

Following the *Georgine* pattern, class negotiations reached an impasse over the future of Ness Motley's remaining cases against Fibreboard. The court-appointed "Settlement Facilitator," Judge Patrick Higginbotham, then suggested that they settle those cases before attempting further negotiation of a global settlement. After concluding the Ness Motley deal — which settled the individual claims for higher-than-average amounts, contingent upon successful completion of a global settlement — Fibreboard and class counsel resumed negotiation of such a settlement.

As those negotiations drew to a close, Chief Judge Parker intervened, taking counsel to his house for a final mediation session. It appears that he was successful, for defense counsel eventually increased their offer to an amount that class counsel later accepted.

Class counsel then filed a complaint in Chief Judge Parker's court, along with motions to certify the class

and approve the settlement. The judge certified the class and found that the settlement was fair.

And Fibreboard's stock soared.[6]

III.
THE FOREST FOR THE TREES.

The majority commits two fundamental errors: first, treating justiciability, due process rights, and certification criteria as mere annoyances to be brushed aside in pursuit of what it believes to be the greater good; and second, failing to assess the aggregate effect of its restrictions on asbestos victims' due process rights.

Justiciability and certification requirements are indispensable in any class action. Justiciability looks, among other things, to whether a person has suffered a legally cognizable injury. If an individual has not been legally injured, it is unlikely that he would receive notice of the action or realize that he is a member of the class. Even if he became aware of the action's potential effect on his legal rights, he would likely remain apathetic: Any effect on him is remote in time and contingent on the future development of a disease or other damage or injury. Thus, such class members are especially vulnerable to abuse by class counsel.

Similarly, certification criteria such as commonality, typicality, and adequacy of representation ensure that representative litigation is truly representative. If class counsel stand to gain from selling out the class or from benefiting one subgroup of claimants over another, some or all class members are deprived of a meaningful opportunity to be heard — one of the most fundamental of all due process rights.

The majority addresses each class protection device in isolation, always finding that the protection does not

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6 See Coffee, *supra* note 1, at 1402 & n. 232.

apply because of a legal rule developed in a different context or an historical analogy that fails to recognize the novelty of this action. Such tunnel vision obscures the fact that while a particular protection might not always be necessary, some combination of protections is. When courts remove all meaningful safeguards — as the majority does here — class members suffer dramatically.

A. THE DANGER INHERENT IN REPRESENTATIVE LITIGATION.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party . . . ." *Hansberry* v. *Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 117, 85 L.Ed. 22 (1940). This "deep-rooted historic tradition that everyone should have his own day in court," 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE (hereinafter "WRIGHT & MILLER") § 4449, at 417 (1981), creates the core of due process: the rights to notice, to control one's own case, and to an opportunity to be heard.

The class action device is an equitable exception to this bedrock principle. See *Hansberry*, 311 U.S. at 41, 61 S.Ct. at 117-18. Not surprisingly, such a "fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems." *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 678 (7th Cir. 1987). More bluntly, "class actions are extraordinary proceedings with extraordinary potential for abuse." *General Motors Corp.* v. *Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996).

Accordingly, the Constitution's guarantee of due process requires us to use this joinder device carefully: In exchange for losing the right to prosecute his own action, a class member must receive a variety of substitute protections. See *Phillips Petroleum Co.* v. *Shutts*, 472

U.S. 797, 811-12, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985); *Hansberry*, 311 U.S. at 45, 61 S.Ct. at 119-20. Though the Supreme Court has largely refrained from determining the scope of those protections, its scant jurisprudence establishes two related principles: First, the extent to which due process requires procedural protections necessarily depends upon the extent to which class members' interests are infringed;[7] and second, we must meet new uses of the device with new protections.[8]

In short, the safeguards required by due process necessarily differ according to the type of action, and when confronted with a new animal, we must analyze those safeguards anew. Reliance on strained analogies to inapposite traditional actions leaves us in what one commentator has aptly labeled a "due process quandary."[9] Thus the irony: The majority eviscerates well-established due process protections because of

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7 See *Shutts*, 472 U.S. at 808-11, 105 S.Ct. at 2972-74 (finding that opt-out right, rather than opt-in requirement, adequately protects class members in light of burdens imposed on them).

8 See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14, 70 S.Ct. 652, 656-57, 94 L.Ed. 865 (1950) (balancing interests of class members and efficient operation of modern investment trusts). The majority's assertion that "[t]he rule that adequate representation is all that due process requires for the traditional mandatory class action in equity was not challenged by *Shutts*," maj. op. at 986 [A-45], is erroneous. The *Hansberry* court reserved judgment on what other procedures might be required, see 311 U.S. at 43-44, 61 S.Ct. at 118-19, and the Court later found that members of mandatory classes have an additional due process right to adequate notice, see Mullane, 339 U.S. at 318-19, 70 S.Ct. at 659-60. Nor did *Shutts* construe *Hansberry* so narrowly. See *Shutts*, 472 U.S. at 808-09 n.1, 105 S.Ct. at 2972-73 n.1 ("The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit such that a decree against those parties in the prior suit would bind the petitioners.").

9 See Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C.

(*concluded on page A-74*)

the "unique facts" of the case, see maj. op. at 993 [A-59], but fails to recognize that those novel facts may actually call for enhanced, not lessened, protections for vulnerable asbestos victims.[10]

B. VULNERABILITY OF THE CLASS.

This case is indeed such a new animal. The district court certified a class

(1) including people who have not yet been injured or do not yet know that they have been injured;

(2) excluding all present claimants;

(3) for settlement purposes only;

(4) in a mandatory action seeking predominately monetary damages.

Certification of futures-only actions creates a massive potential for abuse. Many putative future claimants have manifested no symptoms and do not even know they were exposed. Others are the future spouses and children of asbestos victims, most of whom either do not exist or could not possibly know that they are class members. Thus, the due process standbys — notice and an opportunity to be heard — are meaningless to countless future claimants.[11]

(*continued from page A-73*)

DAVIS L.REV. 871, 911-12 (1995); cf. William W. Schwarzer, *Structuring Multiclaim Litigation: Should Rule 23 Be Revisited?*, 94 MICH. L.Rev. 1250, 1255 (1996) (observing that appropriate accommodation of competing interests differs according to nature of class and claims).

10 We need not consider the outer limits of due process in this case, however, as the district court failed to employ even basic protections such as opt-out rights and adequate representation.

11 See *Ivy* v. *Diamond Shamrock Chems. Co. (In re Agent Orange Prod. Liab. Litig.)*, 996 F.2d 1425, 1435 (2d Cir. 1993) (observing

(*concluded on page A-75*)

Moreover, future claimants are, by definition, persons who have not yet developed a sufficient interest in their claims to file suit; thus, they are likely to be passive and particularly vulnerable to exploitation.[12] Finally, courts have a rotten track record with futures-only actions: Of the two largest such actions, one is *Georgine*, and the other settlement fell apart because the parties radically underestimated the number of claimants. See Coffee, *supra* note 1, at 1417-18 (discussing failure of Dow Corning settlement).

These concerns are mitigated somewhat by the breadth of the "futures" class. Some members are presently injured and aware of their injuries, and some have even spoken with lawyers. While most of these claimants might not have retained counsel for the sole purpose of intervening, some might have, and others at least might have chosen to opt out, had that protection not been removed as well.[13] Of course, any such intervenors protect only their own interests, which differ dramatically from those of class members who are not presently injured. See *infra* part VI.A.2. Thus, futures-only classes are still highly vulnerable to abuse.

This case also presents a radical extension of the mandatory class action. The class complaint seeks, and the settlement provides, predominately monetary relief.

(*continued from page A-74*)

that "providing individual notice and opt-out rights to persons who are unaware of an injury would probably do little good"), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994); see generally Marcus, *supra* note 4, at 889 (explaining that the notice given to *Ahearn* class members was particularly hard for them to understand).

12 See Crampton, *supra* note 4, at 828.

13 Two groups of plaintiffs intervened in this action. Thus, while exclusion of present claimants appears to have limited the opposition, it did not completely eliminate it.

While historically we have permitted mandatory actions when a class sought to litigate joint rights regarding a common fund, the only common fund in this case is the settlement proceeds. To the extent that there is a limited fund, it is a contrived one, created by the litigation and settlement strategies of Fibreboard and its insurers. See *infra* note 17.

The concept of a futures-only mandatory action is also self-contradictory. If we must bind victims in the class in order to protect their rights and ensure an equitable distribution, then we must bind all such victims, not just some. Limiting the class to future claimants grants the equivalent of an automatic opt-out to present claimants, and there is simply no principled way of distinguishing the one group from the other.[14]

Arbitrariness in the class definition might not present a problem by itself, but future claimants, unlike present claimants, are particularly vulnerable. Exclusion of all present claimants has the effect (if not the purpose) of excluding all those who are likely to receive notice, monitor the class action, and oppose the class attorneys' conflicts and other inadequacies.[15]

Finally, this is a settlement class action. Permitting such actions creates an unparalleled opportunity for collusion between defendants and class counsel, as both stand to gain from negotiating a deal providing generous fees for counsel and meager recovery for the class. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 788 (3d Cir.), *cert.*

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14 See Koniak, *Feasting*, *supra* note 4, at 1058; Crampton, *supra* note 4, at 829-30.

15 In addition, the settlement's silence regarding the actual compensation that claimants can expect — other than various caps and limitations on recovery — makes it difficult for class members and courts to evaluate the settlement. That lack of information might be one of the reasons that the intervenors chose not to attack the settlement's substantive fairness on appeal.

denied, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); Crampton, *supra* note 4, at 826-27. Moreover, a defendant may pick his opposing counsel and then negotiate with absolutely nothing to lose from walking away from the deal; class counsel, on the other hand, work pro bono unless they consent to a settlement.

If nothing else, use of a mandatory settlement action with an automatic opt-out for all those likely to intervene, and no opt-out for anyone else, raises a red flag. To the best of my knowledge, no one has ever attempted to do such a thing before: Even the now-discredited *Georgine* settlement permitted opt-outs.

C. DIMINISHED PROTECTION FOR THE CLASS.

A novel action laden with such an extreme potential for abuse certainly demands a close look, but the majority accepts the settling parties' distortion of that background reality and actually ratchets down the degree of protection accorded absent class members.

The *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement. Avoiding an all-or-nothing judgment in the California coverage litigation gave them a powerful incentive to settle, regardless of whether they could extinguish future claims at the same time. As the majority observes, "*None* of the parties was prepared to take the enormous risk inherent in that litigation." Maj. op. at 993 [A-59] (emphasis added). In fact, Fibreboard and the insurers did reach such a settlement. See maj. op. part III (unanimously approving that agreement).

With that cloak removed, the second half of the *Ahearn* settlement is wholly baseless. The class mem-

bers surrendered their claims against Fibreboard, submitted to an arbitration procedure, and agreed to a total cap on damages, individual caps on damages, an absolute ban on punitive damages, and other restrictive provisions. In exchange, Fibreboard gave the class a mere $10 million — less than five percent of its net worth. Fibreboard sought certification based upon a constructive bankruptcy theory, but it walked away with barely a scratch. Not surprisingly, Fibreboard's stock skyrocketed when the settlement was announced. See Coffee, *supra* note 1, at 1402 & n. 232.

Even accepting the settling parties' mischaracterization of the settlement does little to justify certification, however, for traditional class protections still prevent it.

IV.
DUE PROCESS AND THE RIGHT TO OPT OUT.

The majority's treatment of opt-out rights is a paradigmatic example of its erroneous reasoning. Though the Court plainly held in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 2974-75, 86 L.Ed.2d 628 (1985), that class members have a right to opt out of actions (such as this) seeking primarily monetary relief, the majority refuses to recognize that right, on the ground that it was not historically available in traditional "common fund" litigation.

The majority's holding that all rule 23(b)(1) class actions are immune from *Shutts* is in direct conflict with the holding of a sister circuit.[16] Moreover, this case pre-

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16 The Ninth Circuit has held that a class action certified under rule 23(b)(1) and (b)(2) cannot bind absent plaintiffs unless they are allowed to opt out. *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) (holding that absent plaintiffs were not bound by a rule 23(b)(1)-(b)(2) class action for money damages, because the original class action court did not have personal jurisdiction over the plaintiffs and did not provide them with an opt-out right), *cert. dismissed as improvidently granted*, 511 U.S. 117, 114 S.Ct. 1359, 128

(*concluded on page A-79*)

sents anything but a traditional common fund,[17] and the majority's attempt to analogize it to an action to settle a

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(*continued from page A-78*)

L.Ed.2d 33 (1994). See also *In re Real Estate Title & Settlement Servs. Antitrust Litig.*, 869 F.2d 760 (3d Cir.) (reversing an injunction and allowing a collateral attack against a rule 23(b)(1)-(b)(2) class action to proceed in a different jurisdiction), *cert. denied*, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed.2d 44 (1989). In *dictum*, the Second Circuit has recognized that a rule 23(b)(1) action that aggregates claims seeking legal remedies requires an opt-out right. *In re Joint E. & S. Dist. Asbestos Litig. (Findley I)*, 982 F.2d 721, 735 (2d Cir. 1992) (upholding a mandatory class action by beneficiaries of a trust but recognizing that "[i]f the members of the plaintiff class were not all beneficiaries of the Trust, we would think that the applicable standards for personal jurisdiction would be drawn more from *Shutts* than from *Hansberry*"); *In re Joint E. & S. Dist. Asbestos Litig. (Findley III)*, 78 F.3d 764, 777-78 (2d Cir. 1996) (distinguishing the class action from that in *Shutts* because the restructuring of a trust is an equitable remedy).

17 The paradigmatic use of rule 23(b)(1)(B) is for a common (or limited) fund, which exists

> when a fixed asset or piece of property exists in which all class members have a preexisting interest, and an apportionment or determination of the interests of one class member cannot be made without affecting the proportionate interests of other class members similarly situated. Classic illustrations include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, process of a ship sale in a maritime accident suit, and others.

1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS (hereinafter "NEWBERG ON CLASS ACTIONS") § 4.09, at 4-32 through 4-33 (3d ed. 1992). The language of rule 23(b)(1)(B) is broad enough to encompass more than the traditional common fund, *Id.* at 4-31, and the fact that an action meets the requirements of rule 23(b)(1)(B) does not necessarily transform it into one for the division of a fund.

This case deviates from the traditional common fund in a number of ways. First, there is no fund to speak of. The insurance proceeds are not common or limited, but are simply all that the defendants are willing to provide to the settlement. A settlement offer is far from "a fixed asset . . . in which all class members have a preexisting interest." The fact that Fibreboard's asbestos liabilities are greater than its assets is also insufficient to create a common

(*concluded on page A-80*)

trust is entirely unjustified: Far from adjudicating equitable rights in a preexisting fund, the settlement creates a common fund by extinguishing personal rights of action. In short, the majority rationalizes its evisceration of a right that we have already recognized with a call to historical rigidity.

A. BASIC REQUIREMENTS OF THE SHUTTS CASE.

Shutts could not be more unambiguous:

> [W]e hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

472 U.S. at 812, 105 S.Ct. at 2974-75 (citations and footnotes omitted). The Court, however, specifically limited its holding to claims "for money damages or similar relief at law," as opposed to actions seeking "equitable relief."[18] Thus, *Shutts* teaches that in an action seeking money damages, an absent plaintiff is entitled to the right to opt out.[19]

(*continued from page A-79*)

fund, even though it is sufficient to meet the requirements of rule (b)(1)(B). See Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1, 42 (1986) (describing the "constructive bankruptcy" theory for certifying mass torts under rule (b)(1)(B)). See also Marcus, *supra* note 4, at 877-81 (suggesting that a common fund theory does not work for mass torts). Second, the plaintiffs do not have a preexisting interest in Fibreboard's assets; the purpose of the suit is to establish those rights and not to divide preexisting rights.

18 472 U.S. at 811 & n. 3, 105 S.Ct. at 2973-74 & n. 3 ("Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief.").

19 Although *Shutts* involved a state court action, the consensus view is that it applies to federal class actions as well. See *Matsushita*

(*concluded on page A-81*)

Following *Shutts*, a mandatory class action is viable in two cases: (1) where the court has jurisdiction over all the plaintiffs or (2) where the plaintiffs seek equitable relief. Unlike the majority, I believe that whether a class action seeks equitable relief or money damages can be determined only by focusing on the underlying remedy the plaintiffs seek. See, e.g., *Findley I*, 982 F.2d at 735 (affirming certification of a mandatory class action but noting that it would violate due process if the request for relief were for money damages rather than division of a trust).

If one focuses on the plaintiffs' remedy, the *Ahearn* class cannot be characterized as one "seeking equitable relief." The complaint alleges only personal causes of action against Fibreboard for money damages.[20] The prayer for relief seeks general and special compensatory damages, punitive damages, costs of the suit, appropriate declarations and orders, and other relief as may be deemed just and proper. These remedies represent paradigmatic legal remedies.[21] 1 DAN B. DOBBS,

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Elec. Indus. Co. v. *Epstein*, ___ U.S. ___, ___, 116 S.Ct. 873, 888, 134 L.Ed.2d 6 (1996) (Ginsburg, J., concurring in part and dissenting in part) ("In [*Shutts*], this Court listed minimal procedural due process requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation."); *Carlough* v. *Amchem Prods., Inc.*, 10 F.3d 189, 198-99 (3d Cir. 1993); *Brown*, 982 F.2d at 392; *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992) (*dictum*), *cert. dismissed*, 506 U.S. 1088, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Real Estate Title*, 869 F.2d at 766 n. 6. See also Miller & Crump, *supra* note 17, at 29-31.

20 The specific counts in the complaint are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." The last count consists of every "claim or cause of action" that the plaintiffs can assert against Fibreboard.

21 See also Marcus, *supra* note 4, at 888 ("[T]he limited fund concept should rarely, if ever, be available in mass tort litigation. Even if it can be sustained in some instances, there is no denying that the claims asserted are for compensatory damages, and there is arguably a constitutional right to opt out.").

DOBBS LAW OF REMEDIES (hereinafter "LAW OF REMEDIES") §§ 3.1-3.2 (2d ed. 1993). The majority, maj. op. at 976 [A-22], agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos."

B. THE MAJORITY'S CIRCUMVENTION OF SHUTTS.

The majority circumvents *Shutts* by calling *Ahearn* an equitable action.[22] Instead of focusing on the plaintiffs' remedies, the majority characterizes the action based on which subsection of rule 23 the court invoked to certify the class. From the historical fact that rule 23(b)(1)(B) originated in courts of equity, the majority concludes that all actions certified under rule 23(b)(1)(B) are equitable and thus immune from *Shutts*.

1. Conflict with Other Circuits.

The majority's holding is in direct conflict with decisions of the Third and Ninth Circuits. See *Brown*; *In re Real Estate Title*. The Ninth Circuit has directly held that *Shutts* applies to rule 23(b)(1)-(b)(2) actions when the plaintiffs' underlying claims are for money damages.

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22 See maj. op. at 986 [A-44] ("The limitation of *Shutts* to claims of unknown plaintiffs that are predominantly for money damages forecloses application of its holding to 23(b)(1)(B) actions which have always been equitable and often involve unknown plaintiffs."). The majority also intimates that *Shutts* does not apply to rule 23(b)(1)(B) actions because the absent plaintiffs are unknown. See maj. op. at 986 [A-44–A-45]. The unknown-plaintiff exception in *Shutts* does not apply to this case, however.

The court lacks personal jurisdiction over a large number of known plaintiffs who have manifested injuries but failed to file suit before the class action was filed. Moreover, a large number of the exposure-only plaintiffs are known. For example, shipyard workers who have not yet manifested any sign of disease could easily be identified and notified of the settlement. They then could decide whether to opt out. If they did, their individual and derivative wrongful death claims no longer would be part of the settlement.

Brown, 982 F.2d at 392. The Third Circuit also has recognized that a mandatory class action does not have a res judicata effect on absent class members when the underlying claims are for money damages and the court did not have personal jurisdiction over the plaintiffs. *In re Real Estate Title*, 869 F.2d at 768-69. The majority fails to discuss either case.

Both cases arose out of the same antitrust class action. See *Brown*, 982 F.2d at 388-89. The original class complaint sought money damages and injunctive relief and was certified under rule 23(b)(1) & (b)(2). *In re Real Estate Title*, 869 F.2d at 760, 763. The action settled on terms favorable to the defendant, and a number of absent plaintiffs were left without a settlement check.

The first case challenging the no-opt-out class action arose by way of injunction in the Third Circuit. Following settlement of the class action, a number of absent plaintiffs filed a new suit against the same defendants for the same activity. The defendants asked the district court that heard the original class action to enjoin the Arizona state court suit. *In re Real Estate*, 869 F.2d at 762. The district court granted the injunction, but the Third Circuit reversed, classifying the original class action as a hybrid suit seeking both money damages and equitable relief. *Id.* at 768-69. The court applied *Shutts* and held that the district court did not have personal jurisdiction over the absent plaintiffs in the original action and that it would violate due process for the court to enjoin a collateral attack on the class action. *Id.*

The other shoe dropped in a subsequent action filed in federal court in Arizona. The defendants raised a res judicata defense to the plaintiffs' claim, pointing to the class action settlement. The Ninth Circuit rejected the defendants' arguments, holding that the class action did

not have a res judicata effect on absent plaintiffs over whom the district court in the original class action did not have personal jurisdiction. *Brown*, 982 F.2d at 392. The court relied on *Shutts* and held that the absent plaintiffs' money damage claims could not be foreclosed by a rule 23(b)(1) class action, because the action did not include a right to opt out. *Id.*[23]

2. Conflict with Shutts.

The majority's approach to classifying this action is also fundamentally at odds with the approach used by the *Shutts* Court. The exception in *Shutts* is for actions seeking "equitable relief," not for class actions that have their origins in equity.[24] The Court explicitly recognized that class actions originated as an equitable joinder device, and all class actions are "equitable" in that limited sense. *Shutts*, 472 U.S. at 808, 105 S.Ct. at 2972-73. See also *Hansberry* v. *Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.Ed. 22 (1940) ("The class suit was an invention of equity . . . ."); 7A WRIGHT & MILLER § 1751,

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23 The court also held that the absent plaintiffs' claims for injunctive relief were barred by res judicata because the class action could bind absent plaintiffs on their claims for equitable relief. *Brown*, 982 F.2d at 392.

24 It is notable that the *Shutts* Court used the phrase "equitable relief." *Shutts*, 472 U.S. at 812 n. 3, 105 S.Ct. at 2974 n. 3. Equity courts were distinguished from law courts in that their substantive rules, procedures, and remedies differed from law courts. 1 LAW OF REMEDIES § 2.6(3) at 154-55. As one commentator pointed out, procedure "will seldom if ever form a basis for distinguishing law from equity" where the distinction matters. *Id.* at 155 n. 1.

The question then becomes whether the class action is an equitable remedy or an equitable procedural device. I discuss why the rationale of *Shutts* supports that latter interpretation at *infra* part IV.B.3. Further support for the obvious proposition that the class action is a procedural tool comes from the fact that it has never been treated as a "remedy." See 1 LAW OF REMEDIES §§ 1.1-1.6 (listing all remedies available at law and equity).

at 7. Despite that fact, the Court classified the action in *Shutts* as one for money damages. 472 U.S. at 811, 105 S.Ct. at 2974.

The only possible conclusion that can be drawn from the Court's reasoning is that the distinction between damage remedies and equitable remedies turns on what remedies the plaintiff seeks, not on his choice of joinder devices. To hold otherwise, as the majority does in this case, would create an internal inconsistency in *Shutts*: If the origin of the class action is determinative of the classification of an action, then every class action, including the one in *Shutts*, would be an equitable action.

3. Misunderstanding Equitable Remedies.

The majority's assertion that rule 23(b)(1)(B) actions are unique in that they involve only equitable claims is based on an apparent misunderstanding of "equitable remedies" and the history of the class action. Prior to the merger of law and equity, the majority would have been correct in classifying all rule 23(b)(1)(B) class actions (or more appropriately their historical antecedents) as equitable actions, but for reasons different from those the majority offers.

Before law and equity were merged, every class action would have been equitable, as the class action was a procedural device that was available only in courts of equity.[25] As a result, every class action aggregated claims seeking equitable remedies or applying equitable substantive law. The fact that the device was once used exclusively by equity courts does not fore-

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25 The class action originated in courts of equity as a procedural joinder device. See generally 1 LAW OF REMEDIES § 1.1, at 1-2 (distinguishing procedural law, substantive law, and remedial law); *Id.* § 2.1(1), at 57 (noting that differing procedures were available in equity and legal courts).

close the possibility, however, that the device currently is used in conjunction with legal remedies.[26]

Even the majority's own authorities recognize that class actions are now used to aggregate both legal and equitable claims. See 1 NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that suits certified under rule 23(b)(1) "predominately (but not exclusively) involve suits seeking equitable relief"). When Professor Newberg posits that *Shutts* will not apply to classic limited fund cases, he does so because those cases aggregate equitable claims, not because the device had its origins in equity.

> It is unlikely that *Shutts* will be construed to change the highly focused nature of the *equitable relief* addressed in these limited fund class actions by requiring opt-out rights which might serve to frustrate the equitable ends of these suits. There are other types of equitable class actions, such as suits to declare a dividend or suits for injunctive relief against a defendant who has acted generally against a class, which similarly . . . will not be challenged.

Id. § 1.21, at 1-49 (emphasis added, footnotes omitted).

4. Formalistic Distinctions.

The majority's unyielding mantra that rule 23(b)(1) actions are equitable actions makes due process turn on an untenable formalistic distinction between rule 23(b)(1) and rule 23(b)(3), whereunder class actions under rule 23(b)(3) are subject to *Shutts*, and those cer-

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26 In similar situations, where an equitable procedural device has been extended to actions at law, courts have used at least two distinct tests for determining equitable status. The first test focuses on the remedy: If the claim seeks a coercive remedy, it is deemed equitable. The second test characterizes a claim as equitable if the plaintiff seeks to enforce a right that was originally created in the equity courts, or a right that was traditionally decided according to equitable principles. 1 LAW OF REMEDIES § 2.6(3), at 154-55.

tified under rule 23(b)(1) are not. The distinction finds no support in *Shutts*, which involved a state equivalent of rule 23(b)(3) and not the federal rule itself. The Court's analysis, which centered on the need to protect an absent plaintiff from the inherent dangers of representative actions, did not focus on what type of class action was involved, for relying on such a distinction ignores the fact that many class actions can be certified under more than one subsection of rule 23. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-4 through 4-5; 3B J.W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 23.31[3], at 236-37 (2d ed. 1995); 7A WRIGHT & MILLER § 1772, at 425. In fact, a vast majority of classes that meet the requirements of rule 23(b)(1)(B) inevitably will satisfy the rule 23(b)(3) requirements. 1 NEWBERG ON CLASS ACTIONS § 4.01, at 4-5. Due process does not turn on such formalistic distinctions.[27]

C. THE DISTINCTION BETWEEN LAW AND EQUITY.

The majority's argument that applying *Shutts* to rule 23(b)(1) would render all mandatory class actions unconstitutional, is also premised on a faulty understanding of the distinction between law and equity. See maj. op. at 987 [A-45] n.16. What the majority fails to acknowledge is that the distinction between money damages and equitable remedies preserves mandatory

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27 *Brouning-Ferris Indus., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 299, 109 S.Ct. 2909, 2933, 106 L.Ed.2d 219 (1989) (O'Connor, J., concurring in part and dissenting in part) (stating that "the applicability of a provision of the Constitution has never depended on the vagaries of state or federal law"); *Escobedo* v. *Illinois*, 378 U.S. 478, 486, 84 S.Ct. 1758, 1762, 12 L.Ed.2d 977 (1964) (declining to "exalt form over substance" in determining the temporal scope of Sixth Amendment protections); *Crowell* v. *Benson*, 285 U.S. 22, 53, 52 S.Ct. 285, 293, 76 L.Ed. 598 (1932) (opining that "regard must be had, . . . in . . . cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required"); *Chicago, Burlington & Quincy R.R.* v. *Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897) ("In determining what is due process of law regard must be had to substance, not to form.").

class actions in the vast majority of cases, including traditional common fund cases from equity. See NEWBERG ON CLASS ACTIONS § 1.18, at 1-46 (recognizing that the majority of actions that meet the requirements of rule 23(b)(1) seek equitable relief). The only cases affected by *Shutts* are modern cases, such as *Ahearn*, that fall within the broad scope of the rule but do not involve a true common fund.

Take for example *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 14 L.Ed. 942 (1853), and *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1914), two cases that represent the paradigmatic mandatory class action. Both survive *Shutts* because neither involved money damages. In Smith, the class representatives filed a bill in chancery for the division of a trust, a traditional equitable remedy.[28] 57 U.S. (16 How.) at 312. See 1 LAW OF REMEDIES § 2.3(1), at 75. In *Ibs*, the mandatory class action at issue also involved distributions from a trust.[29] 237 U.S. at 671, 35 S.Ct. at 695. Although both actions resulted in a distribution of money, neither involved a legal claim for money damages. See 1 LAW OF REMEDIES § 3.1 (discussing money awards available in equity, but distinguishing between money damages and equitable remedies that award money).

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28 The suit was over proceeds from a book fund maintained by the Methodist Episcopal Church. Smith, 57 U.S. (16 How.) at 303. The fund was established for the care of traveling preachers. *Id.* When the church divided over slavery, both sides agreed to split church property based upon a prearranged formula. *Id.* at 305. The traveling preachers from the south sued the northern church because it refused to relinquish that portion of the fund that belonged to the southern church. *Id.*

29 *Ibs* involved a suit, for money damages, by a participant in a mortuary fund in state court. The question was whether a prior mandatory class action would have a res judicata effect on the plaintiff. The class action was against an insurance company and sought to compel the company to make distributions from a trust. The court held that the action against the trust must be given res judicata effect in the later proceeding.

The difference between legal and equitable actions, while subtle, is important. In an equitable action such as an action by the beneficiary of a trust, a plaintiff's pro rata rights to the trust corpus are already established. Whether the action proceeds individually or as a class action is irrelevant to absent plaintiffs, because in both cases their rights in the corpus of the trust will be affected. See *In Re Joint E. & S. Dist. Asbestos Litig. ("Findley II")*, 878 F.Supp. 473, 530-33 (E. & S.D.N.Y. 1995) (explaining why the already severe limitations on a trust beneficiary mean that a representative action will do little to diminish a beneficiary's rights). In fact, in some cases the class device enhances an absent plaintiff's rights by providing him a voice; the classic limited fund is such a case. The same is not true in a case for money damages.

The decision to proceed individually or as a class makes all the difference in a case for money damages, because only in a class action are a plaintiff's rights controlled by another party. The most obvious consequence of such control is that class representatives may settle to the detriment of absent class members in order to benefit themselves. The inherent risk of such a result is exactly what drove the Court to adopt due process protections in such cases. See *Shutts*, 472 U.S. at 809-11, 105 S.Ct. at 2973-74.

D. UNCONSTITUTIONAL USE OF THE FEDERAL RULES.

Finally, the majority's reliance on the strong presumption of constitutionality that the Federal Rules of Civil Procedure receive is misplaced. The novelty in this case is not the insistence on opt-out rights but on the extension of class actions, particularly rule 23(b)(1)(B) class actions, to mass torts and the expansion of rule (b)(1)(B) to "constructive bankruptcy." Such a use of the federal rules is novel, and in particular the rise of mass torts was unforeseen by the drafters of the rule. *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 & n. 23 (5th Cir. 1996).

The majority's attempt to hide behind the traditional acceptance of mandatory class actions is unavailing in this extension of rule 23(b)(1), for the presumption of constitutionality enjoyed by the Federal Rules of Civil Procedure disappears when the rules are applied in a way unanticipated by their drafters. See 19 WRIGHT & MILLER § 4509. In short, while this action falls within the broad scope of rule 23(b)(1)(B), that fact does not immunize it from due process protections, including opt-out rights.[30]

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30 The appellees argue that even if due process requires an opt-out right, the settlement's "back-end" exit satisfies due process. Even if a "back-end" exit could serve as a proxy for an opt-out provision — a suggestion made only by the Fourth Circuit — the procedure provided in *Ahearn* falls far short of satisfying due process. See, e.g., *In re A. H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.) (finding that a "back-end" exit right provides "everything that an express opt-out provision could give a class member if such right is required under due process"), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989).

In *A. H. Robins*, the court could determine with confidence that the "back-end" exit provided absent plaintiffs with the same rights they would have in an opt-out class action. The class action involved a trust established during a chapter 11 bankruptcy. *A. H. Robins*, 880 F.2d at 717. An absent class member could seek a jury trial if the alternative dispute resolution provided for by the trust did not settle the plaintiff's claim in a satisfactory fashion. *Id.* at 722. Liability, causation, and damages would be submitted to the jury. *Id.* Punitive damages were disallowed, but a plaintiff seeking a jury trial would be entitled to an amount from the trust in lieu of the punitive damage award. *Id.* The exit mechanism left absent plaintiffs a right to a jury trial on precisely those issues on which they had a right to a jury trial before certification. *Id.* at 744 ("The Plan gives every such class member the right to have her claim settled in a trial with all the procedural rights normally attaching to a jury trial. That is everything that an express opt-out provision could give a class member if such right is required under due process.").

The "back-end" exit in this case fails to provide absent plaintiffs with a right substantially equivalent to a jury trial. The exit is nothing more than window dressing. While it allows claimants to settle disputes in front of a jury, it limits all damages to $500,000. By contrast, some plaintiffs have been able to recover several million dollars from asbestos defendants at trial. See, e.g., *Mechanic's*

(*concluded on page A-91*)

V.
COMMONALITY AND TYPICALITY.

The majority is correct that our precedents preclude us from decertifying the class for lack of commonality and typicality. The majority's discussion of these criteria is misleading, however, and its readiness to skip over the protections without considering the consequences is yet another manifestation of its tunnel vision.

A. CIRCUIT PRECEDENT.

Long before defense attorneys even dreamed of mandatory, mass-tort, futures-only class actions, we held that "tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge." *Meat Price Investigators Ass'n* v. *Iowa Beef Processors (In re Beef Indus. Antitrust Litig.)*, 607 F.2d 167, 174 (5th Cir. 1979), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). We even went so far as to "agree" with Professor Newberg that parties may "compromise their differences, including class action issues, through this means." *Id.* at 177-78 (quoting 3

(*continued from page A-90*)

***Family Awarded $14 Million in Auto Brake Asbestos Case*, WEST'S LEGAL NEWS, June 20, 1996, at 1996 WL 339400 (discussing asbestos verdict for two plaintiffs); *Asbestos Litigation — Damages*, CHI. DAILY LAW BULLETIN, June 13, 1995, at 1 (discussing $12 million verdict); *Notable Verdicts*, NAT'L LAW JOURNAL, Apr. 15, 1996, at A15 (discussing $2.2 million jury verdict); *Reviewing Verdicts for Excessiveness*, NEW YORK L.J., Apr. 10, 1996, at 1 (discussing verdicts of $64.6 million for four plaintiffs); *$18 Million Verdict for Asbestos Claims*, NEW YORK L.J., Feb. 15, 1996, at 2 (discussing verdict for five plaintiffs). Such a severe limitation on a party's ability to prove and try damages deprives him of an essential element of a jury trial. I certainly cannot say that a procedure that caps a plaintiff's damages gives him "everything that an express opt-out provision could give a class member." *A. H. Robins*, 880 F.2d at 744.**

NEWBERG ON CLASS ACTIONS § 5570c, at 476). We took *Beef Industry* to its logical conclusion two years later, finding that evaluation of the fairness of a settlement entails a consideration of "the strength of plaintiffs' case on the merits," including "the risks of class decertification." *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 216 (5th Cir. 1981).

Note the bizarre effect of these opinions: Certification criteria are designed in part to protect the class against inadequate representatives, but *Beef Industry* permits those very representatives to compromise the requirements. *Corrugated Container* compounds the effect by holding that certification criteria are part of the merits of a class action. Thus, when it is less likely that certification is proper, and therefore more likely that an individual plaintiff has a right to prosecute his own action, a smaller settlement is necessary to extinguish that right.

The majority is more subtle, finding that all class members have a common interest in reaching a settlement that includes certain terms. See maj. op. at 975 [A-21]. Even so, a generalized common *interest* is not a "*question[] of law or fact* common to the class." FED.R. CIV.P. 23(a)(2) (emphasis added).

Similarly, the majority finds that the legal and remedial theories of the class representatives are typical of those of the class because all class members (1) claim that "Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos" and (2) possess a common interest in settling for a large amount. See maj. op. at 975-76 [A-20–A-21]. Once again, the latter category of "interests" has nothing to do with the underlying legal theories.

The majority's characterization of the plaintiffs' claims is also true only at an extreme level of generality. If a man raped a woman in California and exposed him-

self to another in Texas, both women might claim that he is "liable in tort for damages incurred due to [sexual misconduct]," but no one would seriously claim that the legal theory of battery is similar to that for, say, intentional infliction of emotional distress.

Nor have the settling parties even attempted to bootstrap themselves into typicality by crafting a settlement that postpones resolution of non-typical issues. The settlement's prohibition on punitive damages affects plaintiffs from different states differently; its caps on individual recovery discriminate against the most seriously injured class members; and its spendthrift provisions alter the distribution of funds between extant and latent claimants. Thus, the settling parties have negotiated an alteration of the class members' substantive rights vis-à-vis one another. In short, the majority dutifully follows our precedent by treating commonality and typicality as mere procedural obstacles to be cleared out of the way.

B. PROBLEMS WITH CIRCUIT PRECEDENT.

Three factors make our duty to follow *Beef Industry* and *Corrugated Container* a regrettable one. First, rule 23(a) has a purpose: to protect the due process rights of absent class members.[31] Compliance with the rule might prevent us from lumping people with divergent interests into a single class, but the rule is meant to do just that.[32]

Second, the difficulty inherent in assessing the substantive fairness of a settlement makes prophylactic

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31 See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 796 (3d Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995); 1 NEWBERG ON CLASS ACTIONS § 1.13, at 37-38.

32 See Marcus, *supra* note 4, at 899-90 (criticizing *Ahearn* settlement).

procedural protections crucial to the protection of absent plaintiffs.[33] The range of "fair" settlements is wide in any case,[34] and settlement classes present unique opportunities for collusion between class counsel and defendants.[35] Once the machinery of a settlement class action is set in motion, the judiciary has a very hard time controlling it; thus, it is critical that we craft that machinery well.

Finally, the majority once again fails to consider the interaction of these due process protections with the others it denies. Professor Newberg, the primary proponent of settlement classes, justified relaxing the rule 23(a) criteria by looking to other protections, most notably opt-out rights, to protect the class. See 2 NEWBERG ON CLASS ACTIONS § 11.28, at 60-61. Similarly, the Beef Industry court observed that opt-out rights would help "offset" the loss of other protections. See 607 F.2d at 175. Thus, relaxing rule 23(a) criteria and denying opt-out rights make for a lethal combination.[36]

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33 See *Mars Steel Corp.* v. *Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 683 (7th Cir. 1987) ("The agency problems which [class] actions create require that the district judge be vigilant in protecting the procedural rights of class members."); cf. 7B WRIGHT & MILLER § 1785, at 103 ("A formal class certification determination plays an important role in assuring adequate protection to the absent class members.").

34 See Koniak, *Looking Glass*, *supra* note 4, at 18 ("A poisoned or tainted pudding may taste okay, if not delicious.").

35 See *supra* page 1008; *General Motors*, 55 F.3d at 788; Coffee, *supra* note 1, at 1378-82.

36 While I would follow *Beef Industry* and *Corrugated Container* reluctantly, the majority actually embraces them on the ground that settlement negotiations generate information. See maj. op. at 975-76 [A-19–A-23]. While it is hard to argue in favor of ignoring information, settlement negotiations generate little information regarding commonality and typicality, and it is the majority that ignores any such information.

(*concluded on page A-95*)

VI. INADEQUATE REPRESENTATION.

That leaves two significant due process requirements, the first of which is adequate representation. Instead of vigorously enforcing this requirement, however, the majority lets it slide as well.

A. STANDARD OF REVIEW.

In ordinary litigation, a plaintiff does not need the court to ensure that his attorneys are performing adequately; he can monitor and control them himself. In class litigation, however, class members have no practical control over their attorney.[37] Their only remedy against shoddy representation is to opt out of the class,

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(*continued from page A-94*)

First, no competent counsel would enter negotiations without first divining his clients' legal theories and the questions of law or fact underlying them. Thus, "the process of negotiation does not reveal anything about commonality and typicality." *General Motors*, 55 F.3d at 796.

Second, this justification for relaxing the requirements is inconsistent with the majority's application of them. To the extent that diverging interests emerge in negotiations, those interests militate against mass certification, as they indicate that class counsel negotiated the settlement while suffering from a conflict. The majority relies upon the existence of information in relaxing the criteria, but ignores that information when applying them.

Finally, the majority's emphasis on information is ironic. Conventional wisdom posits that early settlement decreases the amount of information available to counsel and the court. See, e.g., MANUAL FOR COMPLEX LITIGATION 3D § 30.45, at 243 (1995).

37 In theory, the class representative should control the attorney. In practice, class counsel often selects the class representative and is likely to pick one who is passive. Cf. *In re Dresser Indus.*, 972 F.2d 540, 545 n.11 (5th Cir. 1992) (noting consent of client in a class action is of "limited utility" as a safeguard against conflicts of interest).

but the district court denied them even that protection. Having left class members defenseless against their own counsel, the court's duty to ensure adequate representation became all the more critical. Rule 23(a)(4) prohibits a court from certifying a class without first ascertaining that it will receive adequate representation. Rule 23's concerns are not merely prudential, but constitutional: Due process demands that class members receive adequate representation before they are bound by a judgment.[38] An attorney who labors under a conflict of interest cannot satisfy the requirements of rule 23(a)(4).[39]

We must not confuse rule 23(a)(4) with rule 23(e), which scrutinizes only the substantive fairness of a settlement.[40] Rule 23(a)(4) guarantees due process, and a

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38 See *Woolen* v. *Surtran Taxicabs*, 684 F.2d 324, 332 (5th Cir. 1982) ("The adequacy of representation in Rule 23(a)(4) is that essential to due process under *Hansberry* v. *Lee*[, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940),] before absent class members can be bound."); *Gonzales* v. *Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) ("The judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation.") (quoting *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961)).

39 See *North Am. Acceptance Corp.* v. *Arnall, Golden & Gregory*, 593 F.2d 642, 644 n.4 (5th Cir.) (reasoning that attorney's conflict of interest could prevent class certification under rule 23 because of "the important role the attorney plays in protecting the interests of the class"), *cert. denied*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979); see also *In re Fine Paper Antitrust Litig.*, 617 F.2d 22, 27 (3d Cir. 1980) (concluding that attorneys with conflict of interest do not meet the adequate representation requirement of rule 23(a)(4)).

40 See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.) ("We also reject the district court's finding that its authority to approve settlement offers under Fed.R.Civ.P. 23(e) acts to limit the threat to the class from a potential conflict of interest."), *cert. denied*, 484 U.S. 926, 108 S.Ct. 289, 98 L.Ed.2d 249 (1987).

substantively adequate result cannot cure procedural injustice.[41]

More importantly, substantive adequacy does not necessarily mean that a settlement is truly fair; an attorney who negotiated an adequate settlement might have negotiated a better one but for a conflict of interest.[42] Indeed, it would be odd if rule 23(a)(4) did require a court to examine the terms of a settlement; rule 23(a)(4) is a certification requirement, and certification usually precedes settlement. Rules 23(a)(4) and 23(e) are complements, not substitutes; a court applies rule 23(a)(4) before certification to insure procedural fairness and rule 23(e) after settlement to guarantee substantive adequacy.

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41 **[D]ue process must mean something other than that the result is just, otherwise some lynchings would be consistent with due process. A 'fairness' hearing that appraises a settlement made outside the court's presence only as to the substantive fairness of the terms provides no more process than would be provided by a post-lynching hearing that assessed whether the dead guy really did commit the crime.**

Koniak, *Feasting*, *supra* note 4, at 1123.

42 **See *Corrugated Container*, 643 F.2d at 211 n. 25 ("We hasten to add that the adequacy of settlement terms cannot ordinarily redeem a settlement that was bargained by a party in a conflict position.").**

> **The court, to be sure, will not approve a settlement if it is unfair, but "fairness" may be found anywhere within a broad range of lower and upper limits. No one can tell whether a compromise found to be "fair" might not have been "fairer" had the negotiating [attorney] possessed better information or been animated by undivided loyalty to the cause of the class. The court can reject a settlement that is inadequate; it cannot undertake the partisan task of bargaining for better terms. The integrity of the negotiating process is, therefore, important.**

Haudek, *The Settlement and Approval of Stockholders' Actions — Part II: The Settlement*, 23 SW. L.J. 765, 771-72 (1969), *quoted in In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1125 n. 24 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 and *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979).

We apply a mixed standard of review to a district court's determination that a conflict of interest does not exist. The existence of a particular set of circumstances is a factual determination that we review for clear error. Whether those circumstances amount to a conflict of interest is a legal question that we review *de novo*. *FDIC v. United States Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir. 1995) ("we interpret the controlling ethical norms governing professional conduct as we would any other source of law") (quoting *Dresser*, 972 F.2d at 543); see also *Id.* (stating that "we will perform a 'careful examination,' or *de novo* review, of the district court's application of the relevant rules of attorney conduct"). No factual dispute exists in this case, and therefore we must review the district court's decisions *de novo*.

B. CLASS COUNSEL'S FINANCIAL CONFLICT.

Ness Motley represented the class during settlement negotiations despite a financial interest in reaching a settlement that diverged from the class's interest. A divergent financial interest is a paradigmatic conflict of interest, yet the majority refuses to concede that this conflict may have denied the class adequate representation.

The conflict stemmed from Ness Motley's simultaneous representation of both the class and individual plaintiffs who were also suing Fibreboard. While the class settlement negotiations were proceeding, Fibreboard and Ness Motley agreed to settle all of Ness Motley's pre-existing individual lawsuits for a higher-than-average amount. That settlement was partly contingent, however, on Ness Motley and Fibreboard's settling the class claims.

If the class did not settle its claims, Fibreboard would still pay half of the individual plaintiffs' settlement, but they would receive the entire settlement if the class settled.[43] Because Ness Motley represented the indi-

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43 The individual plaintiffs also would receive the entire settlement if Fibreboard won the coverage case.

vidual plaintiffs, but not the class, on a contingency basis, it had a financial interest in settling the class claims on any terms whatsoever, even if those terms were unfavorable to the class.

The majority dismisses this conflict by pretending that Ness Motley, the individual plaintiffs, and the class had similar interests in reaching a class settlement. This is simply wrong.

Ness Motley and the individual plaintiffs had a financial interest in seeing the class settle on any terms. In contrast, the class desired a settlement only if it was more lucrative than the alternative — awaiting the outcome of the coverage case. The expected value of that alternative was significant. If the California Supreme Court affirmed the two lower courts that had ruled favorably for the class, the class would enjoy a practically unlimited compensation fund. Accordingly, it is easy to imagine a proposed settlement beneficial to Ness Motley and the individual plaintiffs but unfavorable to the class.

The district court never should have allowed Ness Motley to represent the class. Rule 23(a)(4) simply does not permit an attorney to represent a class if he suffers from a conflict of interest. It does not matter whether Ness Motley negotiated a favorable settlement; rule 23(a)(4)'s concerns are procedural, not substantive. Even if, *arguendo*, the settlement was favorable, an unconflicted attorney might have negotiated a better one. Fibreboard's attorneys knew that Ness Motley had an interest in settling on any terms, and they undoubtedly converted this knowledge into negotiating leverage.

The conflict of interest in this case was direct and egregious. But I would go a step further and prohibit class counsel from ever simultaneously representing individual plaintiffs in cases such as this, as there is too great an opportunity for corruption.

Consider the different fee structures a plaintiffs' attorney faces in class and individual litigation. As class counsel, he will be compensated under the lodestar formula,[44] leaving him no financial stake in the settlement. When representing an individual plaintiff, he will receive a contingency fee, vesting him with a significant financial stake in the outcome of the litigation.

A shrewd but unethical attorney will accept a significantly smaller settlement in a class action in exchange for a more modest increase in an individual settlement. And even an attorney who would refuse such an outright bribe might be tempted to make concessions during the class negotiations, hoping to develop goodwill that will pay dividends when negotiating over the individual lawsuits.

This is not simply a theoretical problem. Consider the *Georgine* case, in which Ness Motley also simultaneously represented the class and individual plaintiffs. While negotiating the class settlement, Ness Motley and the *Georgine* defendants settled the individual claims for a total of about $138 million. Koniak, *Feasting, supra* note 4, at 1067. Under the terms of the class settlement, on the other hand, the individual plaintiffs would have been entitled to a maximum of about $90 million. *Id.*

At the least, in *Georgine* Ness Motley treated the individual plaintiffs preferentially. At worst, Ness Motley obtained a concession from the defendants at the expense of the class. In either case, it acted improperly

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44 **Under the lodestar formula, a court determines a class attorney's compensation by multiplying the number of hours he has spent on the litigation by an appropriate hourly wage. While the court may determine the hourly wage in part by looking to how favorable a settlement the attorney negotiated, the number of hours the attorney has worked is usually the chief determinant of his total compensation. See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U.CHI. L.Rev. 1, 50 (1991).**

and to the detriment of the class, and it is to prevent such behavior that I would prohibit simultaneous representation altogether.[45]

C. *The Conflict Between Extant And Latent Claimants.*

Another conflict of interest arose from the class attorneys' simultaneous representation of both class members with extant claims and those with latent claims.[46] Because they may seek recovery from the settlement fund immediately, extant claimants would profit from high ceilings on recovery or none at all, as there was little danger that the fund would be depleted before it paid their claims. Latent claimants, on the other hand, cannot seek recovery until some triggering event occurs.[47] Because they may be unable to file a claim for a number of years, they would benefit from damage caps low enough to ensure that the settlement fund will not dry up before it pays their claim.

The majority fails to recognize this obvious conflict of interest. In fact, it makes no mention of the Third Circuit's holding in *Georgine* that an impermissible conflict

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45 See Koniak, *supra* note 4, for a more extensive discussion of the perils of simultaneous representation.

46 The majority misleadingly labels these groups as "near" and "far" futures, which suggests that the difference between these groups is simply one of degree. In fact, there is a difference in kind. All of the extant claimants, or "'near' futures," may file claims as soon as approval of the settlement is final. But none of the "'far' futures" may file suit until some triggering event occurs, and they have no way of knowing when, or even whether, that event will occur.

47 State law determines exactly what is the necessary triggering event. Some states permit exposure-only victims to seek recovery, while others require that a claimant develop some illness from his exposure before permitting him to recover. One group of latent claimants, of course, are the future family members of asbestos victims: future spouses and unborn or even unconceived children. For this group, the necessary triggering event is marriage or birth.

of interest occurs whenever extant and latent claimants are represented by the same attorney.[48] *Georgine*'s analysis is worth quoting at length:

> The most salient conflict in this class action is between the presently injured and futures plaintiffs. As rational actors, those who are not yet injured would want reduced current payouts (through caps on compensation awards and limits on the number of claims that can be paid each year). The futures plaintiffs should also be interested in protection against inflation, in not having preset limits on how many cases can be handled, and in limiting the ability of defendant companies to exit the settlement. Moreover, in terms of the structure of the alternative dispute resolution mechanism established by the settlement, they should desire causation provisions that can keep pace with changing science and medicine, rather than freezing in place the science of 1993. Finally, because of the difficulty of forecasting what their futures hold, they would probably desire delayed opt out like the one employed in *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 150 (S.D. Ohio 1992) (heart valve settlement allows claimants who ultimately experience heart valve fracture to reject guaranteed compensation and sue for damages at that time).
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> In contrast, those who are currently injured would rationally want to maximize current payouts. Furthermore, currently injured plaintiffs

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48 The majority does distinguish the case before us from *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2d Cir. 1992), on the ground that certain members of the class in that case had rights under a trust agreement to have their claims paid first, while there is nothing akin to a trust agreement in *Ahearn*. But *Georgine* also lacked anything similar to a trust agreement, so the distinction does not explain the majority's failure to distinguish *Ahearn* from *Georgine*.

> would care little about inflation-protection. The delayed opt out desired by futures plaintiffs would also be of little interest to the presently injured; indeed, their interests are against such an opt out as the more people locked into the settlement, the more likely it is to survive. *In sum, presently injured class representatives cannot adequately represent the futures plaintiffs' interests and vice versa.*

Georgine, 83 F.3d at 630-31 (emphasis added).

The majority's only explanation for its decision is that the district court's determination that a conflict did not exist was supported by the testimony of the settling parties' expert, Geoffrey Hazard, and the district court's own expert, Eric Green. That explanation is hardly compelling.

The district court's determination that the facts before it did not amount to a conflict of interest was not a finding of fact to which we should defer. Instead, it is a conclusion of law, see *United States Fire Ins. Co.*, 50 F.3d at 1311 (holding that we review *de novo* a district court's application of ethical norms governing attorney conduct), and it is not enough simply to note that two hand-picked law professors — one chosen by the settling parties and the other by the district court — had the same opinion of the law as did that court.

Nor is the reasoning behind the legal opinions of Professors Hazard and Green persuasive. According to the majority, both concluded that a conflict did not exist, essentially because both extant and latent claimants would be better off with a settlement than without one. If that was their reasoning, they asked the wrong question.

Even if there was no conflict between extant and latent claimants as to whether a settlement was a good idea, there was undeniably a conflict between the two groups over the terms of the settlement. It may well

have been appropriate for the same attorneys to represent extant and latent claimants when negotiating with the defendants over the total amount of the settlement. Once the parties agreed to an amount, however, the interests of extant and latent claimants diverged, and they should have been represented by different attorneys for determination of the terms under which the settlement would be distributed to the class.

D. THE CONFLICT BETWEEN PRE- AND POST-1959 VICTIMS.

The global settlement achieved a massive redistribution of wealth. Before the settlement, persons who had been exposed to asbestos before 1959 had far more valuable claims than those who had been exposed after 1959. Fibreboard's insurance policies had expired in 1959, so pre-1959 claimants could seek damages from an insured Fibreboard, with virtually unlimited assets, while post-1959 claimants could only hope to recover from the non-insurance assets of Fibreboard, which amounted to very little. As late as 1993, the settlement value of a pre-1959 claim was three times that of a post-1959 claim.[49] The global settlement, however, eliminated the privileged status of pre-1959 claimants and placed them on equal footing with their post-1959 counterparts.

Because the settlement deprived pre-1959 claimants of a substantial right, they were entitled to separate representation. The majority contends that the class as a whole benefited by sacrificing the special rights of

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49 Fibreboard's pre-1959 claims settled for an average of $12,000 in 1993, while its post-1959 claims settled for only $4,000. See GAF, Fibreboard, *Pfizer Report Decline in Asbestos Cases*, MEALEY'S LITIG. REP., June 2, 1995, at 20. In 1994, the discrepancy almost disappeared, with pre-1959 claims settling for $8,000 and post-1959 claims settling for $7,000. *Id.* As the asbestos world became aware that the expected settlement in *Ahearn* would not differentiate between pre- and post-1959 claimants, the settlement values of those claims naturally moved toward a common figure.

pre- 1959 claimants, and I emphatically agree. That is precisely the problem: It was in the best interest of one part of the class to give up something that belonged to another part of the class, and that created a conflict of interest.

Unitary class counsel was bound to consider the interests of the class as a whole, and those interests required giving up the rights of pre-1959 claimants. But the rights of pre-1959 victims were theirs alone, and they were entitled to counsel who would not relinquish those rights unless it was in their own best interest. Only separate counsel, representing pre-1959 claimants alone, could have done so.

Nor am I persuaded by the majority's contention that Fibreboard would never have negotiated separately with pre-1959 claimants and that unitary representation maximized the value of the settlement. So long as the class was negotiating with Fibreboard over the total value of the settlement, there was no need for separate representation, as pre- and post-1959 claimants had the same interest in obtaining as large a settlement as possible. It was only after the parties had agreed on the total amount of the settlement and had begun to bargain over how it should be divided among the class that pre-1959 claimants needed separate representation. There is no reason to suppose this would have any effect on Fibreboard's willingness to make concessions; it was interested only in the total amount of the settlement, not the allocation of the settlement within the class.

VII.
IMPARTIAL JUDGING.

The second due process requirement that the majority fails to enforce is impartial judging. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). Thus, a litigant is entitled to try his case before a judge who is free of any personal stake in

the outcome. *Tumey* v. *Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1927).

This protection is vitally important in a mandatory class action, for the judge is the only person able to protect class members from an unjust settlement. The class members themselves cannot reject the settlement, and they cannot even reject certification by opting out of the class. They can only present their objections at the fairness hearing and hope the judge will reject the settlement as inadequate. If the judge himself is biased in favor of an unfair settlement, then the class has no protection against it.

The intervenors raise serious questions regarding Chief Judge Parker's ability to conduct an impartial fairness hearing.[50] He had mediated the settlement negotiations, undoubtedly urging the parties to settle on terms he believed to be fair, before the case was even filed. In his lengthy opinion approving the settlement, he referred to his "assistance in the discussions" leading to final agreement. 162 F.R.D. at 516.

Having helped to craft the settlement, Chief Judge Parker had a personal stake in finding it to be fair: A determination that the settlement was unfair would imply that he had acted unfairly in helping to craft it. In light of these facts, a person might reasonably conclude that Chief Judge Parker, despite his dedicated and painstaking efforts, probably developed a natural bias in favor of his own work.[51]

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50 It is well settled that impartiality can reasonably be questioned even where there is no actual bias. See *In re Faulkner*, 856 F.2d 716, 721 (5th Cir. 1988) (*per curiam*).

51 For similar reasons, Congress in 1978 limited the administrative duties of bankruptcy judges. Under the old Bankruptcy Act, bankruptcy judges (then called referees) had been actively involved in the day-to-day affairs of bankruptcy reorganizations. Congress found this objectionable.: "No matter how fair a bankruptcy judge

(*concluded on page A-107*)

The majority concludes that the judge need not have been recused from the fairness hearing, because the settlement negotiations he mediated were a judicial proceeding. I am not so certain. I agree that we are governed by *Liteky* v. *United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), and that if the settlement negotiations were a judicial proceeding, recusal was not required. I also agree that if the negotiations were a judicial proceeding, we must make a case-specific determination: A judge may become so involved in settlement negotiations as to warrant recusal even though the negotiations were judicial proceedings. See *Id.* at ___, 114 S.Ct. at 1157 (noting that recusal may be warranted where bias stems from a judicial source if it amounts to "a deep-seated favoritism or antagonism that would make fair judgment impossible"). As the majority points out, Chief Judge Parker's involvement in this case was not substantial, and recusal is therefore not required unless the settlement negotiations were extrajudicial proceedings.

I part ways with the majority, however, when it comes to deciding whether the settlement negotiations the judge mediated were judicial proceedings. The majority concludes that they were, though its only explanation is to state that "Judge Parker's role in the negotiation process . . . stemmed from three cases filed in his court [i.e., the assignment litigation]." I agree that if the nego-

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(*continued from page A-106*)

is, his statutory duties give him a certain bias in a case, and the bankruptcy court as a result has been viewed by many as an unfair forum." H.R. REP. NO. 595, 95th Cong., 1st Sess. 88 (1978), reprinted in 1978 U.S.C.C.A.N. at 6050. Congress went on to note that "[d]eeper problems arise because of the inconsistency between the judicial and administrative roles of the bankruptcy judges. The inconsistency compromises his impartiality as an arbiter of bankruptcy disputes." *Id.* at 89, reprinted in U.S.C.C.A.N. at 6050. To rectify this problem, Congress limited the role of bankruptcy judges as administrators and mediators. See, e.g., 11 U.S.C. § 341(c) (1994) ("The court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors.").

tiations were a legitimate part of the proceedings in the assignment litigation, they were judicial proceedings. Chief Judge Parker's judicial authority was limited to the assignment litigation, however, and I do not believe that he could conduct judicial proceedings with respect to *Ahearn* simply because it was somehow related to the assignment litigation.

Remember that the parties had not even filed *Ahearn* yet. Thus, any time the judge spent mediating that dispute — as opposed to the insurance cases filed in his court — was community service, not judging.[52]

The rules of civil procedure allow judges to participate in settlement conferences. See FED.R.CIV.P. 16(a)(5) (allowing courts to schedule conference "facilitating the settlement of the case"). Rule 16 settlement conferences are judicial proceedings and generally are not an adequate basis for recusal. Cf. *Liteky*, 510 U.S. at ___, 114 S.Ct. at 1157 (noting that judicial proceedings "can only in the rarest circumstances" form an adequate basis for recusal). The question is whether Chief Judge Parker mediated the settlement negotiations in the course of a rule 16 conference.

If the settlement negotiations he mediated were chiefly negotiations over the assignment litigation, and settling *Ahearn* was incidentalto settling the assignment litigation, the negotiations probably amounted to a rule 16 conference. If, on the other hand, the primary object of the negotiations was to settle *Ahearn*, the negotiations do not fall within the bounds of rule 16. That rule allows judges to schedule conferences only to settle "the case," which surely must mean the case filed and pending before the judge. Rule 16 cannot permit a judge to order settlement conferences over cases that are not

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52 Certainly there can be no criticism of Judge Higginbotham's role. From the start, he served only as a mediator, not a judge. In facilitating agreement, he did precisely what a mediator is supposed to do.

before him — that would be an exercise of power the Constitution does not permit. See U.S. CONST. art. III, § 2 (limiting judicial power to actual cases or controversies).

> Federal courts are not roving engines of justice careening about the land in search of wrongs to right. Rather, federal courts were designed to be much like all other courts: passive entities resolving only the quarrels which are properly put before them by interested parties and which are within the competence of courts in a tripartite system of constitutional government.

Haitian Refugee Ctr. v. Civiletti, 503 F.Supp. 442, 461 (S.D. Fla. 1980), modified, 676 F.2d 1023 (5th Cir. Unit B 1982).

I seriously doubt that Chief Judge Parker was conducting settlement negotiations over the assignment litigation and only incidentally settled *Ahearn* along the way. If so, this is one of the more amazing examples of a tail wagging a dog. I recognize, however, that the content and nature of the settlement negotiations the judge mediated present a question of fact, and I therefore would remand to the district court for findings in this regard.

VIII.
ARTICLE III JUSTICIABILITY.

Finally, the majority simply fails to consider a number of difficult justiciability issues. While questions of Article III standing and variances in state law may seem somewhat rarefied, it is important to remember the central purpose of jurisdictional requirements — to keep us in our place. The constitutionally-assigned task of the federal judiciary is to resolve cases and controversies that Congress and the Constitution have authorized us to adjudicate. When we depart from that role by considering generalized grievances or private dispute resolution mechanisms, we quickly find ourselves acting more as legislative policymakers than as judges.

Failure to honor standing requirements, in particular, can result in devastating consequences for those we intend to help. As standing turns in large part on whether an individual has suffered an injury-in-fact, those who lack standing may be unaware that our legislative dalliances eventually will affect them; thus, they are unlikely to speak up for themselves.

This case presents a particularly egregious example, for the parties and the district court gerrymandered the class to exclude all those who were sufficiently concerned with their injuries to have filed suit. Thus, the class consists largely of people who are unlikely to monitor class counsel's performance or challenge the settlement. In a justice system that depends on robust adversarial presentations, that dynamic leaves the judiciary ill-equipped to evaluate the procedural and substantive fairness of the negotiations and eventual settlement.

This case shatters the constitutional limits placed on the authority of the federal courts by Article III, Section 2 of the United States Constitution. We are obligated to consider these issues, *sua sponte* if necessary, to assure ourselves that the district court properly exercised jurisdiction.[53] It is fairly obvious that here, the district court exceeded its jurisdiction in approving the class action settlement.

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53 The Third Circuit pretermitted the jurisdictional issues raised in a nearly identical case because its decision to decertify the class disposed of the case in favor of the intervenors. See *Georgine* v. *Amchem Prods., Inc.*, 83 F.3d 610, 617, 623 (3d Cir. 1996). Even in that case, one judge wrote separately to emphasize, *inter alia*, that the jurisdictional issues should have been reached. See *Id.* at 635-38 (Wellford, J., concurring). The majority's decision to affirm certification in this case, however, obligates it to address — *sua sponte* if necessary — the troubling jurisdictional problems raised by the district court's approval of the settlement. Nevertheless, the majority has failed even to raise these issues, let alone consider them.

A. THE CAUSES OF ACTION.

The class action complaint alleges only personal causes of action against Fibreboard for money damages.[54] The majority agrees: "The central remedial and legal theory of each of the named plaintiffs [is] that Fibreboard is liable in tort for damages incurred due to exposure to Fibreboard asbestos." Maj. Op. at 975 [A-22].[55] The district court also recognized that the complaint alleges *in personam* claims.[56] Thus, *Ahearn* is a case — admittedly an extraordinary one — involving multiple, *in personam*, state-law causes of action aggregated by means of rule 23, the federal class action device.

B. THE BASIS FOR SUBJECT-MATTER JURISDICTION.

The majority does not discuss the basis for subject-matter jurisdiction. The plaintiffs and the defendants, in their joint appellate brief, assert that federal jurisdiction was available under 28 U.S.C. § 1332 (diversity) and 28 U.S.C. § 1335 (interpleader). The district court's published opinion relies on diversity alone as a basis for federal jurisdiction. See *Ahearn* v. *Fibreboard Corp.*, 162 F.R.D. 505, 522 (E.D. Tex. 1995). In supplemental conclusions of law filed on the same day, however, the district court claimed that federal jurisdiction also is proper under the interpleader jurisdiction statute.

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54 The counts alleged are (1) negligent failure to warn; (2) strict product liability; (3) breach of express and implied warranty; (4) concert of action and conspiracy; and (5) "all other viable claims." This last count consists of every "claim or cause of action" that the plaintiffs can assert "against Fibreboard."

55 The majority also states that "*Ahearn* . . . presents us with claims against a healthy company for personal injuries and a proposed settlement of those claims." Maj. op. at 983 [A-38].

56 The district court actually stated that "[the] claims were, prior to the settlement, *in personam* in character." This statement implies that, in the court's view, the settlement transformed the claims into something other than *in personam* claims.

Diversity of citizenship was an arguable basis for subject-matter jurisdiction. Statutory interpleader jurisdiction is not available here, because there is no res or common fund. See *Wausau Ins. Cos.* v. *Gifford*, 954 F.2d 1098, 1100-01 (5th Cir. 1992).[57] Even if interpleader jurisdiction were present, the weighty Article III justiciability issues would still exist.

These Article III issues arise out of the application of *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), to this multi-state class action. As in cases brought under the ordinary diversity jurisdiction statute, cases brought under statutory interpleader are governed by state substantive law, pursuant to the mandate of *Erie*. Thus, *Erie* applies to this class action regardless of whether federal jurisdiction is proper under ordinary diversity, interpleader, or both.[58]

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57 In *Wausau*, we were faced with "six insurance funds encompassing different periods during a four-year span." 954 F.2d at 1101. Furthermore, the legitimacy of the claims against each fund was not established. *Id.* Cautioning that "[i]nterpleader is not designed to solve all problems associated with multiparty litigation," *Id.* (citing *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U.S. 523, 535, 87 S.Ct. 1199, 1206, 18 L.Ed.2d 270 (1967)), we held: "Because the present case involves six separate funds and because it is unclear whether there are legitimate claims against each fund, we conclude that an identifiable fund as required for interpleader actions is not involved." *Id.*

In *Ahearn*, we are again faced with multiple funds — the policies issued by the two insurers, Continental and Pacific — and the legitimacy of the liabilities against the policies is not well-established — i.e., the validity of all the class members' claims against Fibreboard has not yet been decided. Moreover, because of the potentially limitless liability under these comprehensive general liability policies, the ultimate scope of coverage cannot be determined until damages are awarded on each successful claim. The terms of the policies in Wausau at least limited coverage to a specific dollar amount; there, the total possible liability was easily defined. Yet even there we held that interpleader jurisdiction was unavailable. It follows a fortiori from Wausau that such jurisdiction does not exist in *Ahearn*.

58 See *Griffin* v. *McCoach*, 313 U.S. 498, 503, 61 S.Ct. 1023, 1025-26, 85 L.Ed. 1481 (1941) (applying *Erie and Klaxon Co.* v. *Stentor Elec.*

(*concluded on page A-113*)

C. Rule 23(e) Approval And Article III.

Federal Rule of Civil Procedure 23(e),[59] which requires that the dismissal or compromise of a class action be approved by a district court, triggers the inquiry into federal jurisdiction. The act of approving — or disapproving — a class action settlement is an exercise of judicial power by a district court.[60]

(*continued from page A-112*)

Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) to federal statutory interpleader case); *Perkins State Bank* v. *Connolly*, 632 F.2d 1306, 1311 (5th Cir. 1980) (stating that, with limited exceptions, "substantive state rules of decision generally govern federal interpleader proceedings"); *Bluff Creek Oil Co.* v. *Green*, 257 F.2d 83, 85 (5th Cir. 1958) (applying *Erie* after characterizing § 1335 interpleader action as "just another diversity suit"); *Williams* v. *McFerrin*, 242 F.2d 53, 55 (5th Cir. 1957) (applying Louisiana conflict of laws principles to case, per *Klaxon*, because "interpleader comes under the diversity jurisdiction of the federal courts"); *Whirlpool Corp.* v. *Ritter*, 929 F.2d 1318, 1320-21 (8th Cir. 1991) (stating *in dictum* that *Klaxon* applies to suits brought under § 1335 "because the federal interpleader statute is merely a special brand of diversity jurisdiction") (citing *Griffin*, 313 U.S. at 503, 61 S.Ct. at 1025-26, and *Williams*, 242 F.2d at 55); 7 WRIGHT & MILLER § 1713 (1986) (stating that the Erie doctrine applies fully in both FED.R.CIV.P. 22 and § 1335 interpleader actions) (noting exceptions for certain procedural, remedial, and administrative matters — e.g., pleading rules, the availability of injunctive relief, and attorneys' fees).

59 This provision reads: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." FED.R.CIV.P. 23(e).

60 *Epstein* v. *MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); see *Evans* v. *Jeff D.*, 475 U.S. 717, 726-727, 106 S.Ct. 1531, 1536-1537, 89 L.Ed.2d 747 (1986) (referring to district court's rule 23(e) "power to approve or reject a [class action] settlement"); see also *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 793 (3d Cir.) ("A judicially supervised and approved class action settlement, like a judicially supervised trial, is a means of hearing and determining judicially, in other words 'adjudicating,' the value of claims arising

(*concluded on page A-114*)

Unlike a private settlement in an ordinary case, a class action settlement requires that a federal district court affirmatively exercise its adjudicative authority. Thus, a judicially approved federal class action settlement is a "judgment."[61] The underlying authority to enter such a judgment is, of course, expressly circumscribed by Article III, which limits the judicial power to "cases" and "controversies." U.S. CONST. art. III, § 2.

In approving the class action settlement, the district court purported to release — i.e., extinguish — all claims by class members based on Fibreboard's liability for its asbestos products. See *Ahearn*, 162 F.R.D. at 517 (stating that Fibreboard and the insurers would receive "total peace" in return for providing the global settlement monies). Because the court was exercising its Article III judicial power, it did not have the authority to release claims that did not constitute a valid case or controversy at the time it gave its approval.

There are cases either holding or suggesting that in a settlement, courts may release claims that they would lack "jurisdiction" to try. See, e.g., *Adams Extract Co.* v. *Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 221 & nn. 39-40 (5th Cir. 1981);

(*continued from page A-113*)

from a mass tort.") (quoting with approval Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L.REV. 779, 835 (1985) (footnote omitted)), *cert. denied*, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995).

61 See *Purcell* v. *BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1511 (11th Cir. 1996) (referring to "judgment" approving class action settlement), *White* v. *National Football League*, 836 F.Supp. 1508, 1510-11 (D. Minn. 1993) (describing and entering "judgment" approving class action settlement), *aff'd*, 41 F.3d 402, 406-07 (8th Cir. 1994) (referring to "judgment decree" and "consent judgment" approving class action settlement), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 and *cert. denied*, ___ U.S. ___, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); cf. *Matsushita*, ___ U.S. at ___-___, 116 S.Ct. at 877-78 (treating class action settlement approved by state court as a state court judgment).

Epstein v. *MCA, Inc.*, 50 F.3d 644, 661-64 (9th Cir. 1995), *rev'd on other grounds sub nom., Matsushita Elec. Indus. Co.* v. *Epstein*, ___ U.S. ___, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Matsushita*, ___ U.S. at ___, ___ - ___, 116 S.Ct. at 877, 879-90. All of these cases, however, refer to dimensions of jurisdiction other than the case-or-controversy requirement. For example, many of them involved federal courts' approving the release of state-law claims, or state courts approving the release of exclusively federal claims. See, e.g., *Corrugated Container*, 643 F.2d at 221 & nn. 39-40; *Epstein*, 50 F.3d at 661-64; *Matsushita*, ___ U.S. at ___, 116 S.Ct. at 877. None of these cases has advanced the radical proposition that a federal court, in approving a class action settlement — i.e., in the exercise of its Article III jurisdiction — can release claims not presenting a case or controversy.

Furthermore, courts often have used the "common nucleus of operative facts" test to determine whether unpled claims can be released. See, e.g., *Class Plaintiffs* v. *City of Seattle*, 955 F.2d 1268, 1288 (9th Cir.), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408, 121 L.Ed.2d 333 (1992); *Nottingham Partners* v. *Trans-Lux Corp.*, 925 F.2d 29, 34 (1st Cir. 1991). This test is used for determining whether a court may exercise supplemental jurisdiction, and a federal court may exercise supplemental jurisdiction only over claims that are part of the same Article III case or controversy. See 28 U.S.C. § 1367(a) (1994); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966).

Thus, the release-of-claims cases assume that the released claims are justiciable cases or controversies. Those cases do not challenge the key conclusion that a portion of a settlement is void if it purports to release non-justiciable claims.

D. THE CLASS.

The plaintiff class of natural persons certified in this case — the Global Health Claimant Class — is indeed

sweeping.[62] By its terms, the class definition includes, *inter alia*, the following categories of persons:

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62 **The precise class definition is as follows:**

(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;

(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and

(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraph (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability).

(1) future children of persons exposed to asbestos ("future children");[63]

(2) future spouses of persons exposed to asbestos ("future spouses");[64] and

(3) persons who have been exposed to asbestos, who have not manifested an asbestos-related disease, and who had not filed or had dismissed a lawsuit by August 27, 1993 ("exposure-only" claimants).

No person included in the first two categories meets the irreducible constitutional minimum of standing for any claim. Furthermore, some of the persons in the third category lack standing with respect to some or all of their claims. Thus, several of the claims asserted by these categories of persons present no justiciable case or controversy, and the district court therefore erred in deciding to hear them.

The future children, for example, include "persons" who had not been conceived at the time the complaint was filed.[65] Common sense alone dictates the conclusion that non-existent persons cannot have standing to assert *in personam* causes of action for money damages. In more formal terms, these unconceived plaintiffs cannot prove injury-in-fact and thus cannot establish

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63 The future children purportedly bring "indirect" claims — e.g., claims for wrongful death — derived from the exposure to asbestos of the persons who will become their parents. Some states treat these claims as non-derivative. See *Adams* v. *U.S. (In re "Agent Orange" Prod. Liab. Litig.)*, 818 F.2d 201, 203 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988). Most of these claims are also unripe because the person exposed to asbestos — the future parent of the future child — is still alive.

64 The future spouses also purportedly bring indirect claims — e.g., loss of consortium. Again, some jurisdictions treat these claims as non-derivative. See *Adams*, 818 F.2d at 203.

65 For simplicity, I restrict my analysis to persons not yet conceived.

standing to assert their *in personam* tort claims. Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (defining injury-in-fact).

Similarly, future spouses — who may or may not already be born — are, by definition, not yet married to the exposed persons. Common sense once again dictates the conclusion that these persons — who have not been exposed to asbestos themselves — have not yet been injured in fact because they currently have no relation to exposed persons.

Imagine, for example, the absurd hypothetical of a "person" from each of the first two categories filing individual lawsuits today in federal court — i.e., without resort to rule 23. I do not doubt that any federal court would dismiss their claims immediately for want of justiciability. We must not allow the aggregation of individual claims through the class action device to divert our attention from such a fatal defect.[66]

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66 The rule 23(b)(3) class in the *Agent Orange* case was carefully defined to avoid future children and future spouses. The class definition read as follows:

> [T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides . . . . The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Ivy v. *Diamond Shamrock Chems. Co. (In re "Agent Orange" Prod. Liab. Litig.)*, 996 F.2d 1425, 1429 (2d Cir. 1993) (quoting *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988)), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125, 127 L.Ed.2d 434 and *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1126, 127 L.Ed.2d 434 (1994). This definition restricted the class to past and present spouses and already-born children, thus avoiding the jurisdictional anomalies presented by future spouses and future children.

(*concluded on page A-119*)

Aside from these glaring defects, a more subtle problem exists with respect to the third category of persons that I defined above — i.e., the exposure-only claimants. Properly addressing the problem, however, requires a review of certain fundamental principles of Article III jurisdiction and their application to diversity cases.

E. STANDING.

1. Standing in Relation to Causes of Action.

It is impossible to analyze standing without reference to a cause of action: "[S]tanding is gauged by the specific common-law, statutory or constitutional claims that a party presents."[67] Suppose, for example, that a public

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(*continued from page A-118*)

The appellees would have us believe that the federal courts routinely certify classes including future claimants; the authorities they cite belie that claim, however. In *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 393, 100 S.Ct. 1202, 1207, 63 L.Ed.2d 479 (1980), the class definition did include future claimants, but the district court had declined to certify the class; as a result, the Court never had occasion to consider the standing issues raised by the inclusion of such persons. Likewise, the district court in *Comer* v. *Cisneros*, 37 F.3d 775, 780, 796 (2d Cir. 1994), had declined to certify a class including future claimants. Thus, the holding in *Comer* was merely that the purported class representatives — who were present claimants — had standing, not that the future claimants did.

Finally, *McArthur* v. *Scott*, 113 U.S. 340, 5 S.Ct. 652, 28 L.Ed. 1015 (1885), simply has nothing to do with this mass toxic tort class action. The portion of *McArthur* relied upon by the appellees discusses trusts and estates, as do the cases cited therein. See *Id.* at 401-02, 5 S.Ct. at 673-74.

67 ***International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77, 111 S.Ct. 1700, 1704, 114 L.Ed.2d 134 (1991); see *Catholic Social Serv.* v. *Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994) ("[A] plaintiff's standing must be analyzed with reference to the particular claim made."); see also *Financial Insts. Retirement Fund* v. *Office of Thrift Supervision*, 964 F.2d 142, 146 (2d Cir. 1992) (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).**

(*concluded on page A-120*)

employer has discriminated against an applicant for employment on the basis of race. Undoubtedly, such an allegation of injury would meet Article III's standing requirements for, e.g., a Fourteenth Amendment equal protection claim.

Nevertheless, that injury may not serve as the predicate for standing to assert any conceivable cause of action. For example, such an injury does not operate to confer standing on the applicant for a violation of the right to be free from unreasonable searches and seizures under the Fourth Amendment. For while he could show injury-in-fact with respect to his equal protection rights, he cannot show injury-in-fact with respect to his rights under the Fourth Amendment. See *Lewis* v. *Casey*, ___ U.S. ___, ___ n. 6, 116 S.Ct. 2174, 2181-82 n. 6, 135 L.Ed.2d 606 (1996).[68]

(*continued from page A-119*)

In *Louisiana Landmarks Soc'y* v. *City of New Orleans*, 85 F.3d 1119, 1122 n. 3 (5th Cir. 1996), we stated that "[s]tanding is a concept distinct from the concept of private rights of action." The appellee in that case had failed to brief the implied cause of action issue raised by the appellants, asserting that the appellants had waived a "standing" argument in the district court. We expressed our puzzlement with the appellee's waiver argument by noting that standing and implied rights of action are not equivalent concepts and that, moreover, standing can never be waived, because it is jurisdictional. See *Id.* Thus, *Landmarks* should not be read as implying that standing is unrelated to the causes of action alleged.

68 The Court made this point explicitly:

> [S]tanding is not dispensed in gross. If the right to complain of one administrative deficiency automatically conferred the right to complain of all administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject." *Blum* v. *Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982).

Casey, ___ U.S. at ___ n. 6, 116 S.Ct. at 2181-82 n. 6 (parallel citations omitted).

Thus, standing analysis assumes, at a minimum, that the plaintiff has alleged a cause of action created to vindicate a legally protected interest. The cause of action alleged serves as a necessary frame of reference for the standing inquiry — hence the Court's explicit connection of standing and causes of action in *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 111 S.Ct. 1700, 114 L.Ed.2d 134 (1991):

> Standing does not refer simply to a party's capacity to appear in court. Rather, standing is gauged by the specific common-law, statutory or constitutional claims that a party presents. "Typically, . . . the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*"[69]

In other words, standing analysis does not operate in a vacuum: The allegation of a cause of action frames the inquiry. See *Catholic Social Serv.* v. *Shalala*, 12 F.3d 1123, 1125 (D.C. Cir. 1994).[70]

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69 500 U.S. at 77, 111 S.Ct. at 1704 (quoting *Allen* v. *Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984)) (emphasis in original); see *Catholic Social Serv.*, 12 F.3d at 1125; *Howe* v. *Ellenbecker*, 8 F.3d 1258, 1261 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1373, 128 L.Ed.2d 49 (1994); Financial Insts., 964 F.2d at 146-47; see also *United Food & Commercial Workers Int'l Union, Local 751* v. *Brown Group, Inc.*, 50 F.3d 1426, 1428-29 (8th Cir. 1995), *rev'd on other grounds*, ___ U.S. ___, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996); cf. *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992) ("Where . . . Congress is the source of the purportedly violated legal obligation, we look to the statute to define the injury.") (quoting *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704).

70 I do not suggest that we look to the merits of the cause of action or determine whether the cause of action is valid (in the sense of determining whether the plaintiff ultimately would win). Rather, we must examine the pleadings to determine what cause of action the plaintiff has alleged and whether his allegations of injury, in the context of that cause of action, satisfy Article III standards.

In diversity cases, pursuant to the *Erie* doctrine, state law defines the substantive causes of action. In an ordinary case, we rarely have to confront the interaction between *Erie* and federal standing analysis. Regardless of what else one can say about *Ahearn*, however, no one can fairly accuse it of being an ordinary case.

2. Injury-in-Fact.

In *Lujan* v. *Defenders of Wildlife*, the Supreme Court set out the test for Article III standing as follows:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61, 112 S.Ct. at 2136 (footnote and citations omitted). For the purposes of this case, we need focus only on the first prong of this standard: injury-in-fact.

The *Lujan* injury-in-fact test consists of two sections:

(1) the "invasion of a legally protected interest"; and

(2) the criteria of

  (a) concreteness and particularity; and

  (b) actuality or imminence.

The failure of a plaintiff fully to meet the requirements of both sections constitutes the failure to establish the irreducible constitutional minimum of standing.

Thus, to survive the Article III inquiry, a plaintiff must make — *inter alia* — a showing that he had a legally protected interest that has been invaded. The failure to make such showing would be fatal to his attempt to establish Article III standing.

3. Effect of State Law.

The second part of the *Lujan* injury-in-fact test is governed purely by federal law (even in diversity cases), for no pronouncement of state law can affect a federal court's determination of whether an invasion of a legally protected interest is, e.g., sufficiently concrete and particularized to satisfy Article III. Similarly, no decision of state law can affect a federal court's determination of whether such an invasion is sufficiently actual or imminent to satisfy Article III.

In diversity cases, however, the first part of the *Lujan* injury-in-fact test is not completely independent of state law. The concept of "invasion of a legally protected interest" immediately invites the question of who or what protects the interest. In an ordinary, non-diversity case, federal law is the source of substantive rights and of causes of action designed to vindicate those rights. In diversity cases, it is state law that creates legally protected interests and provides causes of action to vindicate them.

This conclusion cannot be avoided by chanting the mantra that federal law cannot depend on state law. Under *Erie*, the judgment of a federal court depends on state substantive law in a diversity case. The definition of a legally protected interest — as well as the provision of a cause of action to vindicate that interest — is

a matter of substantive law.[71] If the federal injury-in-fact test articulated in *Lujan* depends on the definition of a legally protected interest — and it does — then the outcome of that federal inquiry depends in part on how state law defines that interest.

Moreover, when a state has declined to create a given cause of action, it has decided not to accord legal protection to a particular interest. Therefore, if a given exposure-only cause of action embraced in the settlement is not founded on a substantive right,[72] it is impossible for a person asserting that claim to prove injury-in-fact. This is so because the injury-in-fact test requires proof of the invasion of a legally protected interest. See *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136; cf. *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704

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71 In a recent case interpreting the Warsaw Convention, the Supreme Court had occasion to consider whether the question of who may bring suit is substantive or procedural. See *Zicherman* v. *Korean Air Lines Co.*, ___ U.S. ___, ___, 116 S.Ct. 629, 634, 133 L.Ed.2d 596 (1996). The Court was interpreting Article 24 of the Convention, which leaves to domestic law the issues of who is entitled to sue and what types of damages they may recover. See *Id.* at ___ - ___, 116 S.Ct. at 633-34. The Court concluded:

> The most natural reading of [Article 24] is that, in an action brought under Article 17, the law of the Convention does not affect the *substantive* questions of who may bring suit and what they may be compensated for . . . . It does not seem to us that the question of who is entitled to a damages award is procedural.

Id. at ___, 116 S.Ct. at 634 (emphasis added). Thus, the question of who may bring suit is a question answered by substantive law — in a diversity case, state substantive law. This is not to say that standing in federal court is purely an issue of state law in a diversity case; rather, the role of state law is to identify, within federal constitutional limits, the persons who have legally protected interests and what those interests are.

72 This is equivalent to saying that the law of the relevant state (determined through a choice of law analysis) does not authorize that exposure-only cause of action.

(stating that substantive claim is a predicate for standing analysis).[73]

4. Choice of Law Analysis.

The causes of action alleged in *Ahearn* are state-law causes of action brought on the basis of diversity jurisdiction. Standing must be measured by the cause of action pled, see *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704; therefore, the standing of the exposure-only plaintiffs must be gauged by the causes of action they assert.

All of the exposure-only claimants have a common predicate for their causes of action: Their claims, by definition, are based on mere exposure to asbestos, not on an extant injury caused by exposure to asbestos. The states vary, however, in the degree to which they

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73 Cases that opine in broad language that state law cannot affect the diversity jurisdiction of the federal courts are inapposite. Cf., e.g., *Begay* v. *Kerr-McGee Corp.*, 682 F.2d 1311, 1315 (9th Cir. 1982). In *Begay*, the court did opine that state law cannot create or enlarge federal jurisdiction, but that statement must be viewed in context.

The *Begay* court faced a state statute that granted a substantive right and then purported to state that the sole remedy for violation of the right was an administrative claim over which a state commission had exclusive jurisdiction. The court responded that a state law, having conferred a substantive right, cannot determine whether a federal court sitting in diversity has jurisdiction over a claim based on that right. See *Id.* at 1315-17. Rather, the proper inquiry in such a case is whether the complaint stated a claim upon which relief could be granted. See *Id.* at 1315, 1317, 1320.

This analysis does not apply to the Article III justiciability issues raised in *Ahearn*. The existence *vel non* of a cause of action is a factor that the Supreme Court has incorporated into the Article III standing inquiry. See *Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Reinforcing this approach is the unambiguous recognition by the Court that we are to measure standing according to the particular common-law, statutory, or constitutional claim asserted. See *International Primate*, 500 U.S. at 77, 111 S.Ct. at 1704. Thus, in diversity cases, whether a state-law cause of action exists at all is a jurisdictional issue insofar as it relates to standing and injury-in-fact, not an issue of whether a claim for relief has been stated.

recognize a cause of action predicated on exposure alone — i.e., they vary in the degree to which they legally protect an interest in being free from exposure to asbestos.

In Pennsylvania, for example, "asymptomatic pleural thickening is not a compensable injury which gives rise to a cause of action." *Simmons* v. *Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232, 237 (1996). Pennsylvania does not recognize, in the absence of manifest injury, a legally protected interest either in (1) being free from the increased risk of cancer because of exposure to asbestos or in (2) being free from present emotional distress resulting from exposure to asbestos (i.e., distress caused by the fear of contracting cancer). See *Id.* 674 A.2d at 237-38.[74] Consequently, because Pennsylvania does not legally protect those interests, a plaintiff

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74 Despite this unambiguous holding, the Supreme Court of Pennsylvania has allowed plaintiffs to recover medical monitoring costs for exposure to asbestos. See *Simmons*, 674 A.2d at 239-40. The court stated that such costs were properly awarded for meritorious exposure-only cases but that damages for increased risk and fear of cancer were not authorized. See *Id.* 674 A.2d at 239-40.

There are two ways to analyze the phenomenon of exposure-only causes of action. First is the monolithic view — i.e., that there is only a single cause of action based on exposure to asbestos, for which there are multiple remedies (some of which may not be available). Second is the "polylithic" view (for lack of a better word), that there are multiple causes of action for exposure to asbestos (some of which may not be available) — i.e., there is one cause of action for increased risk of cancer, one cause of action for medical monitoring costs, etc.

It is largely irrelevant which of these two models is more elegant from a conceptual standpoint. What is important — indeed, determinative — for our inquiry is which of the two each state has adopted. Pennsylvania's high court unambiguously has held that Pennsylvania law supports no cause of action for increased risk of cancer or for present emotional distress arising from the fear of cancer. Thus, the court's statement about medical monitoring damages is best viewed as the authorization of a distinct cause of action for medical monitoring expenses. Reading the opinion otherwise would defy its plain language regarding Pennsylvania's nonrecognition of increased risk and emotional distress causes of action.

asserting such causes of action could not possibly establish injury-in-fact under the standing test announced in *Lujan* — i.e., he cannot demonstrate the invasion of a legally protected interest.

States other than Pennsylvania also have declined to recognize all of the exposure-only causes of action embraced in the instant global settlement.[75] Such unauthorized claims are not founded upon legally protected interests. Thus, because those claims cannot properly be before an Article III court, they cannot be extinguished by the *Ahearn* global settlement. Therefore, because the global settlement purports to extinguish those claims, reversal or vacatur is required.

It was necessary to conduct a choice of law analysis to determine the answer to the threshold question of standing in this case. More specifically, the district court should have conducted the choice of law analysis to determine whether every class member alleged the invasion of a legally protected interest — per the *Lujan* injury-in-fact test — with respect to each claim they asserted. The failure to do so resulted in the district court's exercising its powers over claims not presenting

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75 See, e.g., *Burns* v. *Jaquays Mining Corp.*, 156 Ariz. 375, 752 P.2d 28, 29-31 (Ct.App. 1987) (holding that subclinical asbestos-related injury is not sufficient to support cause of action), review dismissed, 162 Ariz. 186, 781 P.2d 1373 (1989); *DeStories* v. *City of Phoenix*, 154 Ariz. 604, 744 P.2d 705, 707-11 (Ct.App. 1987) (same); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984) (holding that present physical injury caused by exposure to asbestos is "essential element" of claims for mental anguish and medical monitoring costs); *Capital Holding Corp.* v. *Bailey*, 873 S.W.2d 187, 192 (Ky. 1994) (requiring manifestation of asbestos-caused injury before recognizing existence of cause of action for negligence based on exposure to asbestos); *Larson* v. *Johns-Manville Sales Corp.*, 427 Mich. 301, 399 N.W.2d 1, 2 (1986) (holding that cause of action for asbestosis accrues upon discovery of disease, not at time of exposure to asbestos); *Locke* v. *Johns-Manville Corp.*, 221 Va. 951, 275 S.E.2d 900, 904-06 (1981) (holding that injury does not occur upon exposure to asbestos, but rather upon development of disease).

a case or controversy — i.e., in the absence of Article III jurisdiction.[76]

F. ERIE, DIVERSITY, AND ARTICLE III.

The majority's failure to raise and address the Article III issues is directly contrary to *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), and

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76 The appellees cite a legion of cases indiscriminately — and in most cases without sufficient analysis — for the proposition that the exposure-only claims present a case or controversy. These cases, for one reason or another, are insufficient to overcome the force of *Lujan* and *International Primate.*

For example, the appellees cite *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978), as an example of a case where the Supreme Court found exposure to a harmful substance a sufficient injury-in-fact for standing purposes. The plaintiffs sought a declaratory judgment that a federal statute capping liability for nuclear accidents had violated their constitutional rights. See *Id.* at 67, 98 S.Ct. at 2627. Three justices wrote separate concurrences expressing their conclusions that the dispute in that case was not within the district court's jurisdiction. See *Id.* at 94-103, 98 S.Ct. at 2641-46 (concurring opinions of Justice Stewart, then-Justice Rehnquist, and Justice Stevens). The majority's standing analysis appeared to focus on environmental and aesthetic injuries unconnected to the claims asserted by the plaintiffs, which were claims for violations of the Due Process and Takings Clauses of the Fifth Amendment. Compare *Id.* at 69, 98 S.Ct. at 2628 (claims alleged in complaint) with *Id.* at 72-74, 98 S.Ct. at 2629-31 (injuries alleged in complaint).

That methodology — analyzing injury unanchored by the substantive claim asserted — is no longer available to us in light of *Lujan* and *International Primate.* In fact, the analysis advanced by the *Duke Power* majority is logically inconsistent with the Supreme Court's modern standing framework, embodied primarily in *Lujan* and enhanced by the unanimous directive in *International Primate.* Given that irreconcilable inconsistency, we have no choice but to follow the Court's more recent pronouncements.

Helling v. *McKinney*, 509 U.S. 25, 28, 113 S.Ct. 2475, 2478, 125 L.Ed.2d 22 (1993) — a case not cited by the appellees — is not on point, because the plaintiff alleged present injuries based on exposure to an alleged toxin (second-hand tobacco smoke). See also *Georgine*, 83 F.3d at 636 (Wellford, J., concurring). As a result, the Supreme Court never reached the issue of standing based on mere exposure to a toxin.

(*concluded on page A-129*)

Angel v. *Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947). In *Guaranty Trust*, the Court faced the question of whether a state statute of limitations barring a class action was to be applied by a federal court sitting in diversity. See *Guaranty Trust*, 326 U.S. at 100-01, 65 S.Ct. at 1465-66. The Court expressly stated that *Erie* implicates the jurisdiction of Article III courts: "Our starting

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(*continued from page A-128*)

In *Agent Orange*, the Second Circuit did not mention either *Lujan* or International Primate in stating that the exposure-only plaintiffs had sustained an "'injury in fact.'" See *Agent Orange*, 996 F.2d at 1434 (relying only on *Duke Power*). Although I admire the Second Circuit's handling of the massive *Agent Orange* litigation, I must respectfully disagree with its analysis that exposure-only claimants in that litigation met Article III's requirements. Other than *Duke Power*, the court appeared to rely only on cases involving the interpretation of the term "injury" in insurance policies. See *Id.* These cases, however, are not authoritative with respect to the manner in which "injury-in-fact" is defined for Article III purposes. But see *Id.* The Supreme Court's recent guidance in *Lujan*, on the other hand, is dispositive of that definitional issue. The appellees cite several bankruptcy cases to support their exposure-only theory — e.g., *In re UNR Indus.*, 20 F.3d 766, 770-71 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 509, 130 L.Ed.2d 416 (1994); *Findley* v. *Blinken (In re Joint E. & S. Dist. Asbestos Litig.)*, 129 B.R. 710, 834-37 (E. & S.D.N.Y. and Bankr. S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *modified on reh'g*, 993 F.2d 7 (2d Cir. 1993); *Lindsey* v. *Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 92-P-10000-S, Civ.A. No. CV94-P-11558-S, 1994 WL 114580, at *1 (N.D. Ala. Apr. 1, 1994). On its face Article III does not apply to bankruptcy courts, which are Article I courts. See *Rohm & Hass Texas, Inc.* v. *Ortiz Bros. Insulation, Inc.*, 32 F.3d 205, 210 n.18 (5th Cir. 1994). Because of the statutory scheme requiring that matters be referred to bankruptcy courts by district courts, however, the jurisdiction of the bankruptcy courts may be limited by Article III. See, e.g., *In re Interpictures, Inc.*, 86 B.R. 24, 28-29 (Bankr. E.D.N.Y. 1988); John T. Cross, *Congressional Power to Extend Federal Jurisdiction to Disputes Outside Article III: A Critical Analysis from the Perspective of Bankruptcy*, 87 NW.U. L.Rev. 1188, 1197-98 (1988).

If Article III does not apply to bankruptcy courts, the cited cases are plainly distinguishable. If it does apply, the reasoning of those cases is erroneous. The two district court cases do not cite to *Lujan* or *International Primate*. The Seventh Circuit's decision in *UNR* does cite to the former, but only in a conclusionary fashion and without any in-depth analysis.

point must be the policy of federal jurisdiction which *Erie R. Co.* v. *Tompkins* embodies." *Id.* at 101, 65 S.Ct. at 1466 (citation omitted).

Recognizing that the *Erie* doctrine "[i]nevitably" applies to suits in equity, the Court framed the issue presented as follows:

> Is the outlawry, according to State law, of a claim created by the States a matter of "substantive rights" to be respected by a federal court of equity *when that court's jurisdiction is dependent on the fact that there is a State-created right*, or is such statute of "a mere remedial character" which a federal court may disregard?

Id. at 107-08, 65 S.Ct. at 1469 (citation omitted) (emphasis added). Thus, the Court explicitly recognized that the viability of a state-law cause of action was an essential predicate of diversity jurisdiction.

The Court's holding in Guaranty Trust was unambiguous:

> Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law.

Id. at 110, 65 S.Ct. at 1470. Thus, a state's decision to limit the life of a state-created cause of action must be respected by federal courts sitting in diversity. It is equally plain — indeed, it follows *a fortiori* — that when a state has declined to give life to a cause of action at all, federal courts sitting in diversity also must refuse to entertain that cause of action.

In fact, we have interpreted a decision of the Supreme Court as specifically stating that federal courts sitting in diversity must not entertain diversity actions that are

unavailable under state law. See *Kuchenig* v. *California Co.*, 350 F.2d 551, 556 (5th Cir. 1965) (interpreting *Angel*), *cert. denied*, 382 U.S. 985, 86 S.Ct. 561, 15 L.Ed.2d 473 (1966). In deciding whether indispensability of a party was a matter governed by state or federal law in a diversity case, we applied an analysis in *Kuchenig* that closely parallels appropriate the *Erie* /standing analysis in *Ahearn*.

We first noted that "every court that has dealt with th[at] issue at all seems to have treated it, appropriately in our view, as a run-of-the-mine [*sic*] *Erie* problem, requiring the usual balancing of substantive and procedural elements." *Kuchenig*, 350 F.2d at 555. We stated further:

> [I]ndispensability, while not properly regarded as a jurisdictional issue, is closely related to jurisdiction, *and may act to defeat diversity jurisdiction* . . . . [R]ules of joinder depend on the substantive rights and liabilities of the parties, present and absent. In diversity actions, these substantive rights and liabilities are creatures of state law.

Id. at 555-56 (footnotes and citations omitted, emphasis added). We thus recognized an inevitable relationship, in diversity cases, between state substantive law and federal jurisdiction. We also noted that this relationship was not confrontational, but symbiotic: "Professor [Charles Alan] Wright characterizes the conflict in these cases as 'more apparent than real': state law determines the interests of the parties; federal law determines whether these state-created rights render a missing person indispensable." *Id.* at 556.[77]

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77 **Critically, we modified Professor Wright's apparent conflict formulation in one critical respect: "This short-hand formulation must at least be qualified insofar as it leaves room for a federal court**

(*concluded on page A-132*)

This approach to indispensability of a party — a matter "closely related to jurisdiction" that "may act to defeat diversity jurisdiction," *Id.* at 555 — parallels the approach I have applied above in relation to standing. State law determines the substantive rights and interests of the exposure-only claimants. When a state has conferred a substantive right, federal law determines whether persons asserting such a right meet Article III requirements.

When a state has not conferred such a right, it is not within the power of a federal court to entertain that action in diversity. See *Id.* at 556. The district court's diversity jurisdiction in this multi-state class action depended on the existence of state-created causes of action. See *Guaranty Trust*, 326 U.S. at 107-08, 65 S.Ct. at 1469 (stating that a federal court's diversity jurisdiction is "dependent on the fact that there is a State-created right"). In order to determine whether it had jurisdiction over all of the claims released in the class action settlement, the district court had to conduct a choice of law inquiry to determine which states' laws applied to which causes of action. Any claims not authorized by state law should have been explicitly excised from the settlement. The adjudication by the district court of those claims violated Article III limits on that court's jurisdiction.

Under these circumstances, we have no discretion: We must reverse or vacate the judgment approving the

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(*continued from page A-131*)

to run afoul of *Angel* v. *Bullington* by entertaining diversity actions unavailable under state law." *Id.* (citation omitted). Professor Wright had acknowledged this limitation, referring to a prominent district judge's articulation of it: "'Judge Wyzanski carefully points out the limitation that if, as a matter of substantive law, a state does not recognize that a plaintiff has a particular right of action unless he joins with him certain others, then the federal court in a diversity action is precluded from giving a plaintiff who fails to join those others an opportunity to proceed as though alone he had a substantive right.'" *Id.* (quoting 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (1964 pocket part) (Wright ed. 1961)).

class action settlement. In reviewing the approval of a class action settlement, we may not modify the terms of the settlement but must approve or disapprove it in its entirety. *Cotton* v. *Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977).

The reason for this rule is straightforward: Class action settlements often include delicate compromises, the disruption of which would lead one or more of the parties to reconsider the wisdom of the settlement. Therefore, if an appellate court negates part of a class action settlement — e.g., because of justiciability problems — it would have to vacate or reverse and remand for further proceedings. It could not simply excise the objectionable portion of the settlement and uphold the remainder as a viable settlement. See *Id.*

IX.
SUMMARY AND CONCLUSION.

Unencumbered by legislative safeguards and shedding nearly every judicial protection, the district court enacted a novel, untested tort reform package. As a result, Fibreboard's victims find themselves guinea pigs in a dubious (and legally unfounded) experiment.

The only protection accorded the class was a rule 23(e) fairness hearing. The district court also appointed a guardian ad litem to represent absent class members, but he did so only after class and defense counsel had completed the settlement. Thus, class members received absolutely no structural or procedural protections; instead, they had to rely on an after-the-fact review of the settlement's substance.

The district court and the guardian ad litem undertook that task diligently, but an after-the-fact substantive review is far too little, far too late. The court cannot conduct a trial in order to avoid one; nor can it turn back the clock and appoint different counsel to renegotiate the settlement fairly. Thus, the extent to

which class counsel's numerous conflicts and Fibreboard's stacking of the deck actually affected the final settlement is unknowable. As Fibreboard entered the negotiations in constructive bankruptcy and left with more than ninety-five percent of its assets intact, however, there is reason to be skeptical.

The effect of replacing the tort system with an administrative processing center is equally hard to ascertain, for judges lack legislative fact-finding and investigative capabilities. If the trust proves to be funded adequately and managed fairly, it might process claims more efficiently than the courts, reducing transaction costs and providing plaintiffs with faster and more reliable recovery. As such a reduction in transaction costs would generate a surplus for Fibreboard and the class, Fibreboard might deserve to walk away with over $200 million in remaining assets.

On the other hand, the trust might attempt to impose arbitrary limits similar to those of the *Georgine* trust and stonewall plaintiffs' counsel who protest, forcing them to endure a tedious series of procedural delays before their clients finally receive a day in court. The trust might also be inadequately funded, as was the Dow Corning settlement, leaving plaintiffs scraping for what little they can get while bureaucrats struggle to hold on to their jobs.

In short, we simply do not know what the courts have wrought. What we do know is that this "reform" involves denial of established constitutional rights; relaxation of already lax ethical rules; extinguishing of claims that we have no power to adjudicate, much less abolish; and a significant likelihood of collusion between the defendant and the class counsel.

I respectfully dissent from the majority's refusal to reverse — or veto — certification of this no-opt-out, mass-tort, settlement-only, futures-only class action.

MEMORANDUM OPINION
[CITE AS: 162 F.R.D. 505]

(United States District Court —
E.D. Texas, Tyler Division)

(Filed July 27, 1995)

(Gerald AHEARN, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, on Behalf of Themselves and Others Similarly Situated, Plaintiffs, v. FIBREBOARD CORPORATION and Bethlehem Steel Corporation, Defendants, Continental Casualty Company, CNA Casualty Company of California, Columbia Casualty Company and Pacific Indemnity Company, Defendant-Intervenors. Owens-Illinois, Inc. on Behalf of Itself and Others Similarly Situated, Additional Counterclaim Defendant; Civ. A. No. 6:93cv526)

ROBERT M. PARKER, Circuit Judge.

This action was filed to obtain judicial approval of a class settlement (the "Global Settlement") which, if finally approved, will resolve all future[1] asbestos-related personal injury claims against Fibreboard Corporation ("Fibreboard"), and a longstanding dispute between Fibreboard and two of its insurers, Continental Casualty Company ("Continental") and Pacific Indemnity Company ("Pacific") (Continental and Pacific are sometimes referred to collectively as the "Insurers") regarding the scope and extent of its insurance coverage available to Fibreboard to cover its asbestos liabilities. The agree-

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1 Throughout this opinion, a "future claim" means a claim by a Global Health Claimant Class member covered by the Global Settlement Agreement. The Global Health Claimant Class essentially consists of all persons having a claim arising out of exposure to asbestos or asbestos-containing products for which Fibreboard may bear legal liability, where that exposure occurred prior to August 27, 1993, and where the claim had not been filed as a lawsuit or settled as of August 27, 1993. The precise class definition is set out in detail in the Judgment Regarding Class Certification.

ments now before the Court for approval reflect a settlement among parties who have aggressively asserted and controverted the rights and claims that will be finally compromised and settled if the Court enters a final judgment. The principal parties to this litigation are the following: Gerald Ahearn, James Dennis, Charles W. Jeep, James Ellison and William James Mitchell, the class representatives of the plaintiff and defendant asbestos health claimant classes in this action (the "Global Health Claimant Class," or the "Class"); Fibreboard, which manufactured and distributed asbestos-containing products, principally asbestos insulation, from the 1920s until 1971; Continental, CNA Casualty Company of California and Columbia Casualty Company, which issued general liability policies to Fibreboard; Pacific, which Fibreboard alleges issued it a general liability policy; Owens-Illinois, Inc. ("Owens-Illinois"), the class representative of a defendant class of third-party claimants (the "Global Third-Party Claimant Class"); Bethlehem Steel Corporation ("Bethlehem"), the class representative of a defendant class of certain employers and insurers (the "Longshore Defendant Class"); Esteban Yanez Ortiz, Marion Behee, Paul Cochran, Edee Cochran, Ida Beck, John R. Allgood, Henry Evers and Lester E. Taylor (the "Ortiz Intervenors"), intervenors represented by the law firm of Baron & Budd, who have objected to this settlement; and James Flanagan and David H. Middleton (the "Flanagan Intervenors"), intervenors represented by the Maritime Asbestos Legal Clinic, a Division of the Jaques Admiralty Law Firm, who have objected to this settlement.

OVERVIEW

This action is the latest installment in the continuing saga of asbestos-related personal injury litigation against Fibreboard. If the Global Settlement is finally approved, it will be the last.

The parties to the Global Settlement (the "Settling Parties") agreed to the settlement because each found

the Global Settlement preferable to the alternatives. Under the Global Settlement, Fibreboard will survive with its assets intact; the Global Health Claimant Class members will be better compensated than if Fibreboard were bled dry in the tort system; and the Insurers will rid themselves once and for all of a potentially ruinous liability. The only real loser under the Global Settlement is the asbestos litigation industry — the army of lawyers, consultants, and experts of every stripe — which has historically consumed the lion's share of the funds expended by asbestos defendants and their insurers in dealing with their asbestos liabilities.[2]

Without the Global Settlement, Fibreboard's chances of survival range from fair to nil, depending on the outcome of its insurance dispute. All Global Health Claimant Class Members, but especially those whose claims mature far in the future and those who were first exposed to Fibreboard's asbestos-containing products after 1959, face a serious risk of receiving little or no compensation from Fibreboard without the settlement.

The prerequisites of Rule 23(a) have been met. Mandatory class treatment is proper under the plain language of Rule 23(b)(1)(B). The only real obstacle the Global Settlement faces is its relative novelty. It remains to be seen whether Rule 23 will finally be determined to be flexible enough to embrace such a case. Put another way, the primary question presented by this case is whether the courts can provide a forum wherein a business plagued with continuing mass tort liability can negotiate a fair and final resolution the problem, or

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[2] **The Asbestos Litigation Industry was not without a voice in these proceedings. The Jaques firm, which represents the Flanagan Intervenors, purports to have an inventory of thousands of unfiled claims which allegedly would be affected by approval of the Global Settlement to the detriment of the firm. One of that firm's primary objections to the Global Settlement is that it would limit attorneys' fees to 25% of a claimant's recovery under the Global Settlement rather than a higher contractual contingent fee.**

whether the courts' competence is limited to parceling out the corpse in bankruptcy.

BACKGROUND AND SETTLEMENT NEGOTIATIONS

A. ASBESTOS LITIGATION GENERALLY

Asbestos-related personal injury and wrongful death litigation began in the courts of East Texas in the late 1960s. The first modern-day asbestos-related personal injury case in this country was brought in this Court in 1967 by Claude Tomplait against Fibreboard and other defendants. Through the late 1970s, plaintiffs' counsel around the country crafted theories of liability against the asbestos defendants they had identified. Plaintiffs' counsel conducted discovery, assembled a mass of documents bearing on liability that are now well known to every experienced asbestos judge, and identified the various medical conditions that could be forensically attributed to asbestos exposure. By the mid-1980s, the fundamental legal theories and liability cases against the early defendants, including Fibreboard, had been established, and litigation against these companies intensified dramatically.

Facing enormous liabilities and overwhelming defense costs, many defendants ended up in bankruptcy, including a number of companies previously considered to be immune from financial difficulty. See *In re Asbestos Products Liability Litigation*, 771 F.Supp. 415, 420 (J.P.M.L. 1991). Beginning in 1982 with Unarco Industries, Inc. and Johns-Manville, Inc. the list of corporate asbestos bankrupts now includes such defendants as Celotex Corporation, Eagle-Picher Industries, Inc., H. K. Porter Company, Inc., Keene Corporation, National Gypsum Company, Forty-Eight Insulations, Inc., and Raymark Industries, Inc.

As asbestos-related personal injury litigation mushroomed in the 1980s, asbestos dockets across the country grew exponentially, and plaintiffs in many jurisdictions began to face substantial delays in having their

claims resolved. Transaction costs outpaced compensation to victims. Rand Corporation studies in 1983 through 1985 found that only 37% to 39% of money paid by asbestos defendants actually went to victims, with 61% to 63% consumed by transaction costs. Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

By 1990, the situation had reached critical proportions. In September 1990, Chief Justice Rehnquist appointed a panel, the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee"), to study asbestos litigation and make recommendations. In November 1990, eight federal district judges with significant asbestos experience sent a letter to the Judicial Panel for Multidistrict Litigation ("MDL Panel"). They urged the MDL Panel to reverse its several prior rulings declining requested MDL transfers, and asked that the MDLL Panel consolidate all federal asbestos litigation in a single judicial district. These judges argued that consolidation would, among other things, "facilitate global settlements," and allow the transferee court to "fully explore . . . national disposition techniques such as classes and sub-classes under Rule 23."

In March 1991, the Asbestos Ad Hoc Committee issued its report. The report has been described as a "ringing condemnation" of the treatment of asbestos claims in the tort system. See *Georgine* v. *Amchem Prods.*, 157 F.R.D. 246, 265 (E.D. Pa. 1994). The Asbestos Ad Hoc Committee stated: "[T]he [asbestos] situation has reached critical dimensions and is getting worse. What has been a frustrating problem is becoming a disaster of major proportions to both the victims and the producers of asbestos products, which the courts are ill-equipped to meet effectively." Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation ("Asbestos Ad Hoc Committee Report") at 2 (1991). The Asbestos Ad Hoc Committee also expressed its hope

that some alternative dispute resolution mechanism for processing asbestos claims could be fashioned. *Id.* at 14. It concluded that: "The volume and complexity of asbestos cases have resulted in the violation of a basic tenet of American justice and the spirit of the Civil Justice Reform Act of 1990: speedy and inexpensive resolution of cases." *Id.* at 10

On July 29, 1991, the MDL Panel issued an order transferring all federal personal injury asbestos litigation to Judge Weiner of the Eastern District of Pennsylvania for coordinated or consolidated pretrial proceedings. *In re Asbestos Products Liability Litigation*, 771 FSupp. 415. The MDL Panel voiced its hope that the MDL transfer might foster global settlements of the "asbestos mess," noting that transfer "offer[s] a great opportunity to all participants who sincerely wish to resolve these asbestos matters fairly and with as little unnecessary expense as possible." *Id.* at 424. At the time of the MDL transfer, almost 30,000 asbestos-related personal injury claims were pending in the federal courts, with two times that number pending in the state courts. *Id.* at 416, 421.

After the MDL transfer, Judge Weiner appointed plaintiffs' and defendants' steering committees for the MDL litigation, the members of which included Ronald Motley, of Ness Motley, as one of the co-lead counsel of the Plaintiffs' Steering Committee; Steven Kazan, of the law firm Kazan, McClain, Edises & Simon, as a member of that committee; and Stephen M. Snyder,[3] counsel for Fibreboard, as a member of the Defendants' Steering Committee. One of the tasks of the steering committee

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3 Mr. Snyder is a partner in the San Francisco law firm Brobeck, Phleger & Harrison. Since the early 1980's, Mr. Snyder's representation has focused on asbestos litigation defense and, in particular, the defense of Fibreboard. Between 1985 and 1988, he represented the members of the Asbestos Claims Facility in northern California, and served on a number of national committees of that organization. Since 1988, he has been Fibreboard's national counsel for defense of asbestos bodily injury cases.

was to attempt to solve the asbestos crisis on a global basis.

Settlement negotiations began between the Plaintiffs' and Defendants' Steering Committees in the MDL litigation. The parties made substantial efforts at global negotiations involving all plaintiffs and all defendants. The primary purpose of the MDL settlement talks was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims. Judge Weiner encouraged these global settlement negotiations. The talks did not produce a national settlement, but they did bear fruit. Judge Weiner's unrelenting efforts have resulted in many thousands of claims being settled against some but not all defendants, and they served as a springboard for the subsequent negotiations that eventually led to the settlement of this case. Judge Weiner's efforts also greatly aided the negotiations that resulted in a settlement between asbestos victims and defendants who had formed the Center for Claims Resolution ("CCR"), a claims handling facility created in late 1988 in the wake of the dissolution of a similar organization, the Asbestos Claims Facility. See *Georgine*, 157 F.R.D. at 266-67. Fibreboard had a difficult time fitting itself into the MDL-related settlement talks because it had no cash with which to make settlements.

B. FIBREBOARD BACKGROUND

Fibreboard has employed different strategies to defend asbestos injury cases over time. Early on, like most defendants, Fibreboard relied on *Manville* to bear the brunt of the defense of cases. When Manville declared bankruptcy in 1982, Fibreboard had to rely totally on a then-existing interim agreement under which one of its insurance carriers, Fireman's Fund Insurance Company, provided Fibreboard with a defense of asbestos injury claims and paid indemnity as necessary.

Fibreboard joined the Asbestos Claims Facility ("ACF"), which began operations in 1985. The formation

of the ACF was an effort by more than 30 companies that faced asbestos claims, and by some of their insurers, to create a mechanism to resolve asbestos-related claims through unified claims handling and joint representation in asbestos-related personal injury litigation. The ACF was an insurance settlement. Fibreboard settled policy disputes with certain of its insurers — but not with Continental or Pacific — in order to enter the ACF. Producer members of the ACF, including Fibreboard, received a complete defense and indemnity with respect to claims for compensatory damages, even though they may have had gaps in their insurance coverage.

When Fibreboard entered the ACF, it anticipated that defense costs and indemnity levels would be kept within reasonable limits, and filings of cases in which the claimant did not appear to have any significant disease would be minimized. ACF membership overall did not achieve the results Fibreboard desired on liability and case control issues. In fact, ACF membership drew Fibreboard into types of cases and into jurisdictions where it previously had not been sued and Fibreboard became a "national" defendant sued in regions of the country and in segments of asbestos litigation in which it had not faced liability previously. The result was to double Fibreboard's exposure, even though the facts giving rise to that exposure remained unchanged.

When the ACF ceased operations in October 1988, Fibreboard no longer had any right to a defense or payment of indemnity by Fireman's Fund because the limits of that insurance coverage had been exhausted. Fibreboard had no insurance assets except for the proceeds of two settlements with the American Insurance Group of Companies ("AIG") and with Home Insurance Company, totaling approximately $100 million, and the coverage provided by policies issued by Continental and Pacific that was disputed by the Insurers in then pending litigation. When it left the ACF, Fibreboard did

not have enough cash to pay settlements of asbestos injury cases and Fibreboard's ability to mount a defense was greatly reduced because it had no insurance coverage for defense, it had insufficient funds to pay for defense, and it faced a difficult time putting together a national network of defense counsel in cooperation with other former ACF members who were at odds with one another in the wake of the difficult process of disbanding the ACF.

C. FIBREBOARD'S INSURANCE COVERAGE DISPUTE

Continental issued a comprehensive general liability policy to Fibreboard commencing in May 1957, which Fibreboard terminated effective March 15, 1959. The policy had no aggregate limit, but had a $1,000,000 per occurrence limit and a $500,000 per claim limit. Pacific was alleged to have issued a similar policy to Fibreboard in May 1956.

Since 1979, Fibreboard has been engaged in litigation with Continental and Pacific as to whether Fibreboard is entitled to be defended and indemnified under those policies with respect to asbestos-related personal injury, wrongful death, and related claims. In the early 1980s, Fibreboard's action against Continental and Pacific was consolidated with other similar actions in California. Fibreboard's insurance coverage litigation, came to be captioned *In re Asbestos Insurance Coverage Cases, Judicial Council Coordination Proceeding No. 1072* (the "*Coverage Case*").

The *Coverage Case* was tried in several phases. The trial was one of the largest and most complex proceedings in the history of American civil jurisprudence, involving numerous insureds and insurers. At stake for Fibreboard and the insurers was the question of whether Fibreboard would be determined to have no further insurance coverage under the Continental and Pacific policies or, in stark contrast, virtually unlimited coverage under those policies.

The trial court determined that any exposure to Fibreboard's asbestos products during the policy period triggered coverage; that once coverage was triggered, the insurer was liable for the full amount of the damages recovered by the claimant, subject to the per occurrence and per claim limits; and that each claim was a separate "occurrence." The court also ruled that insurers could seek equitable contribution from one another, but not from Fibreboard.

The insurers, including Continental and Pacific, appealed the trial court's decision in the *Coverage Case*, and the appeals were consolidated. Oral argument was conducted in several phases during the Summer of 1993, with the last phase completed on August 27. On November 15, 1993, the California Court of Appeal issued an opinion substantially affirming a number of the principal aspects of the trial court's judgment. However, the Court of Appeal simultaneously granted a joint motion of Fibreboard, Continental and Pacific to sever several insurance coverage issues unique to those parties, and to vacate submission of those issues pending further report to that court on the progress toward obtaining judicial approval of the settlement at bar. Accordingly, the disputes with respect to those severed coverage issues remain unruled upon by the California Court of Appeal, and their outcome thus remains uncertain even at the intermediate appellate level.

There are five issues currently before the California Supreme Court or the California Court of Appeal that have a significant bearing on the ultimate liability of Continental and Pacific to Fibreboard under their primary policies. These issues are commonly referred to as (i) trigger of coverage;[4] (ii) scope of coverage;

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[4] **The California Supreme Court recently determined that a continuous trigger applies in third-party general liability policies.**

(*concluded on page A-145*)

(iii) number of occurrences; (iv) double anchor; and (v) lost policy. Two of these issues — trigger of coverage and scope of coverage — involve both the Continental and Pacific policies. Two issues — number of occurrences and double anchor — involve only the Continental policy. The lost policy issue involves only the Pacific policy. A loss on any one of these issues could substantially impair, if not totally eliminate, Fibreboard's ability to pay future claims. Two expert witnesses, former California Supreme Court Justice Marcus M. Kaufman and Yale University Law Professor George Priest, testified at the fairness hearing with respect to the issue of the risk — viewed both as of August 27, 1993 and today — that Fibreboard would lose the *Coverage Case* pending in the California appellate courts. Based on California law and the concerns and propensities of the California Supreme Court, however, it was the opinion of both Justice Kaufman and Professor Priest that as of August 27, 1993, there was a significant risk to Fibreboard that the California Supreme Court would render decisions on one or more of the coverage issues that would have the effect of either eliminating or substantially reducing further indemnity obligations by Continental and Pacific to Fibreboard for asbestos-related personal injury claims. It was also their opinion that the same risk exists today. No objector proffered any witness, testimony or evidence to contradict or impeach in any way the conclusions provided by Justice Kaufman and Professor Priest.

(*continued from page A-144*)

The court noted the similarity of the trigger issue in the *Coverage Case*, but deemed it appropriate, given the unique nature of asbestos litigation, that trigger of coverage questions specifically involving asbestos claims be left for decision on an appropriate record in a case in which they are squarely presented. See *Montrose Chemical Corp. of California* v. *Admiral Ins. Co.*, 10 Cal.4th 645, 676 n. 16, 42 Cal.Rptr.2d 324, 341 n. 16, 897 P.2d 1, 18 n. 16 (1995).

D. FIBREBOARD AND THE INSURERS

Following the dissolution of the ACF, Fibreboard found itself with large potential asbestos liabilities, about $100 million in cash from settlements of its AIG and Home Insurance policies, and the disputed Continental and Pacific policies. Fibreboard approached the asbestos Plaintiff's bar and explained its situation. The "Structured Settlement Program" ("SSP") was the result. Under the SSP, Fibreboard agreed to settle pre-1959 claims for 40% cash, with the remainder to be paid on September 1, 1993, which deadline could be extended if the *Coverage Case* was not by then resolved, until September 1, 1996. Fibreboard also agreed to conserve its corporate assets, and it agreed that if it lost the *Coverage Case*, all of the companies assets would be turned over to the plaintiffs. The SSP was offered nationwide, and was generally accepted by plaintiffs' counsel, but higher settlement values were demanded to compensate for the risk that the deferred portion of the settlement would never be paid if Fibreboard lost the *Coverage Case*.

In December 1988, Fibreboard and Continental entered into what became known as the "Interim Agreement." Continental agreed to fund the 40% cash portion of SSP settlements, which amount was to be reimbursed if Continental won the *Coverage Case*, Continental agreed to fund Fibreboard's defense, up to annual limits or "caps" of $25 million to $29 million per year, and Continental and Fibreboard agreed to cooperate in the management of pre-1959 claims.

The SSP did not solve Fibreboard's settlement problems. Many plaintiffs going to trial against other defendants often took Fibreboard to trial as well rather than attempt to deal with credit and set-off problems created by the SSP. As a result, Fibreboard became a defendant in a number of large consolidated trials which generated substantial defense costs for Fibreboard. Furthermore, Fibreboard's attempts to bring settlement values

back to pre-ACF levels proved costly. In 1988 and 1989, Fibreboard's defense costs were almost twice the value of its negotiated settlements. In 1990, defense costs were $52 million, as compared to the $45 million nominal value in negotiated settlements. By June 1990, Fibreboard reached its annual defense cap under the Interim Agreement, and Continental therefore declined to pay Fibreboard's defense costs incurred thereafter in 1990.

In the course of negotiations to have the defense caps lifted, Fibreboard proposed in late 1990 to Continental and Pacific that the parties negotiate a complete settlement of the policies. Continental declined the proposal. Fibreboard and Pacific pursued the negotiations.

Because Fibreboard had no insurance coverage for post-1959 claims, and because all claims covered under the Pacific policy were also covered under the Continental policy, Fibreboard entered into separate settlement negotiations with Pacific beginning in 1990 and culminating 1992. Under the resulting agreement (the "Pacific II Agreement"), Pacific would pay Fibreboard a maximum of $360 million to cover post-1959 claims, the final amount depending on the outcome of the coverage litigation and Fibreboard obtaining an order determining that Continental would have no further rights against Pacific for any asbestos-related defense or indemnity.

By 1991, Fibreboard was feeling intense pressure to initiate a new settlement program. It was facing major consolidated trials in Texas, Mississippi and Baltimore, and it had exhausted its defense monies under the Interim Agreement's defense caps. In order to shift some of the pressure to Continental, Fibreboard initiated its assignment settlement program. Under that program, Fibreboard paid no cash for pre-1959 claims, but assigned its rights to the proceeds under the Continental policy, together with any bad faith claims. Fibreboard agreed to preserve its net worth and corporate

assets, and agreed that if it lost the *Coverage Case*, it would be responsible to pay the entire settlement amounts. Under the assignment settlement program, Fibreboard typically settled a law firm's entire inventory of cases, with a settlement average of over $11,400 per case, more than twice the $5,400 average under the 40% cash SSP.

Continental objected that the assignment settlements breached the Interim Agreement provisions calling for joint management of cases and claim-by-claim evaluation of cases, that the settlements violated policy provisions prohibiting assignment of policy rights, and that the settlement amounts were inflated, and that the pre-1959 claims were assigned a disproportionately high share of the gross settlement amount in each office-wide settlement agreement. Fibreboard filed a number of lawsuits to test whether it's assignments were valid, and in June 1992, Fibreboard was granted summary adjudication in the Superior Court in Alameda County, California in a case known as *Andrus* v. *Fibreboard Corp.* The California Court of Appeal summarily rejected Continental's Writ of Mandate, and judgment in Andrus was entered in Fibreboard's favor in September 1992.[5] In July 1992, Continental wrote to Fibreboard and stated that it would provide a defense notwithstanding the defense caps in the interim agreement. Fibreboard determined that it would continue the assignment settlement program as long as Continental continued to reserve its coverage position.

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5 The decision of the Alameda County Superior Court in the Andrus case was eventually reversed on appeal. The California Court of Appeal ruled in *Fibreboard Corporation* v. *Continental Casualty Corp.*, No. A059716 (Cal.Ct.App. Oct. 19, 1994), that Fibreboard did not have the right to enter into assignment settlement agreements. On January 4, 1995, the California Supreme Court denied Fibreboard's petition for review, and the decision of the Court of Appeal is now final.

E. GLOBAL SETTLEMENT NEGOTIATIONS

In 1990, the Federal Judicial Center convened a conference of judges, academics and counsel to address the continuing issues related to asbestos litigation. In the wake of the 1990 conference, members of the asbestos bar and the judiciary took preliminary steps toward national action on the asbestos problem. A number of federal judges organized to explore class action treatment of the problem. In July 1990, some members of the asbestos plaintiffs' bar filed a class action in this Court pursuant to Fed.R.Civ.P. 23(b)(1)(B), *Linscomb* v. *Pittsburgh Corning Corp., et al.*, Civil Action No. 1:90cv5000 (E.D. Tex.). The action was commenced on behalf of all persons (present and future) with asbestos-related personal injury claims. Many of the major asbestos defendants were sued in Linscomb, including Fibreboard. Preliminary proceedings were conducted in this Court on Linscomb in the summer of 1990. Steering committees were formed. Ronald Motley and Joseph F. Rice, of the law firm Ness, Motley, Loadholt, Richardson & Poole ("Ness Motley") were appointed to the steering committee, and Mr. Motley was designated as one of the coordinating counsel for the plaintiffs. The parties conducted settlement meetings and explored whether an overall solution to asbestos injury litigation could be found.

Fibreboard approached Mr. Motley to discuss a global settlement because Mr. Motley had been outspoken about the need for alternative approaches to asbestos litigation, and because asbestos lawyers generally advised that Ness Motley involvement would be necessary for any settlement. Mr. Motley, along with his partner at Ness Motley, Mr. Rice, agreed to consider global settlement negotiations on an assignment basis.

Fibreboard also approached Steven Kazan and Harry Wartnick in late 1990 or early 1991. Mr. Kazan and Mr. Wartnick were selected because they had the most information about Fibreboard's West Coast activity, and

the plaintiffs' bar looked to them for guidance in Fibreboard litigation.

Having decided to pursue global negotiations, the Ness Motley lawyers, Mr. Kazan and Mr. Wartnick ("Plaintiffs' Counsel")[6] retained the law firm of Caplin & Drysdale, Chartered, to represent them and assist them in handling certain highly complex tax, insurance, class action and commercial litigation issues that might arise in the negotiations and that they believed might be beyond their areas of personal expertise.

Fibreboard supplied Plaintiff's Counsel with information about its past claims experiences, historical settlement averages, and financial information, on a confidential basis. Plaintiffs' Counsel also drew upon a substantial body of knowledge about Fibreboard that had been collected by them and by other plaintiffs' counsel. During the many years of asbestos-related litigation involving Fibreboard, various plaintiffs' counsel had conducted massive discovery of Fibreboard, including document discovery and depositions of Fibreboard's corporate officers and knowledgeable employees. These counsel had exhaustively examined the evidence bearing upon Fibreboard's involvement with asbestos and its knowledge of the hazards of asbestos. Plaintiffs' Counsel also retained experts to provide an estimated value for Fibreboard absent its asbestos liabilities and to project future asbestos claims against Fibreboard.

Armed with this information, Plaintiffs' Counsel set out to settle the post-1959 claims, which would be Fibreboard's responsibility, to use as a benchmark for assignment settlement of the pre-1959 claims. In November 1991, it appeared that the parties had agreed to price terms of $278 million for post-1959 cases, and

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6 Another Ness Motley partner, Joseph B. Cox, Jr., became involved in these negotiations in May 1992. Tr. at 1074-75. From that point on, the term "Plaintiffs' Counsel" as used herein refers to Messrs. Rice, Cox, Kazan and Wartnick.

$1.86 billion for pre-1959 cases, but negotiations broke down over questions of opt-out rights and contribution and indemnity.

Continental had been kept informed of the settlement negotiations and had attempted to participate, but Plaintiffs' Counsel insisted on negotiating only with Fibreboard as long as there was a coverage dispute. In March 1992, Continental proposed a settlement of just the pre-1959 cases, but Fibreboard objected to any settlement that addressed only part of the company's asbestos litigation problem.

With global negotiations stalled, Fibreboard began negotiating with Ness Motley. An agreement was signed in December 1992, now known as the "Initial Ness Motley Agreement." The Initial Ness Motley Agreement covered approximately 20,000 cases of Ness Motley and associated firms across the country, with provisions to add more cases. The average price per claim under the initial Ness Motley Agreement was $13,000, with post-1959 claims to be funded through the Pacific II settlement, and pre-1959 claims to be settled on an assignment basis.

The Initial Ness Motley Agreement required that Fibreboard obtain either Continental's consent to the assignment or a court order approving the assignment. Thus, pursuant to the Initial Ness Motley Agreement, on January 11, 1993 Fibreboard filed suit in this Court against Continental, *Fibreboard Corp.* v. *Continental Casualty Co.*, Civil Action No. 6:93cv11 (E.D. Tex.), seeking: (i) a declaration that the assignment in the Initial Ness Motley Agreement by Fibreboard to the claimants of Fibreboard's rights under the Continental insurance policy was valid; (ii) a declaration that the amounts Fibreboard assigned pursuant to the Initial Ness Motley Agreement were fair and reasonable; and (iii) a bar order cutting off Continental's equitable contribution rights as against Pacific. Such a bar order was simultaneously sought by

Fibreboard against Continental in state court in Alameda County, California.

In February 1993 Continental's parent, CNA Financial Corporation, announced that Continental was ready to discuss a global settlement with Fibreboard. A status conference was held before this Court on March 10, 1993, at which representatives of Fibreboard, Continental and Ness Motley were present. The Court and the parties discussed the possible appointment of a Settlement Facilitator, and on March 23, 1993, the Court appointed Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit to act as Settlement Facilitator in connection with the litigation pending in this Court between Fibreboard and Continental.

The parties set out the status of the matter and the parties' respective positions for Judge Higginbotham, and after hard-fought negotiations arrived at an agreement on April 9, 1993 (the "April 9 Agreement"). The April 9 Agreement provided, *inter alia*, that the parties would use their best efforts to achieve a global resolution of all of Fibreboard's asbestos liabilities, including the resolution of present cases and resolution of future asbestos personal injury claims. In the negotiations leading up to the April 9 Agreement, Continental took the position that any global settlement with Fibreboard had to be structured as a non-opt-out class action. For Fibreboard, the *sine qua non* was that any settlement be funded within Fibreboard's available insurance resources.

Pacific had not participated in the negotiations leading up to the April 9 Agreement because it considered the Pacific II Agreement to be binding. In response to the Fibreboard suit seeking approval of the Initial Ness Motley Agreement, and after having reached the April 9 Agreement, on April 13, 1993 Continental commenced a separate suit in this Court against both Fibreboard and Pacific, seeking a declaration that Conti-

nental's rights to equitable contribution against Pacific were unaffected by the Pacific II Agreement. *Continental Casualty Co.* v. *Pacific Indemnity Co. and Fibreboard Corp.*, Civil Action No. 6:93cv 223 (E.D. Tex.). That suit was subsequently consolidated with Fibreboard's action relating to the Initial Ness Motley Agreement.

Negotiations continued on an on and off basis, sometimes under Judge Higginbotham's supervision and sometimes independently. On July 13, 1993, Messrs. Rice and Cox met in Dallas with Judge Higginbotham and representatives of Continental and Fibreboard. At that meeting Judge Higginbotham offered his view that a global settlement covering both present and future cases appeared too complex to negotiate. Accordingly, he suggested that any global settlement be limited to future cases, and that a settlement of the Ness Motley cases — which could serve as the model for settling the presently pending Fibreboard cases — should precede further global negotiations.

With the continued active assistance of Judge Higginbotham, and after hard-fought, arm's-length negotiations, on August 5, 1993, Continental, Fibreboard and representatives of Ness Motley agreed to an amended Ness Motley Agreement (the "Substitute Ness Motley Agreement") settling substantially all of Ness Motley's presently pending claims. The Substitute Ness Motley Agreement resolved approximately 45,000 presently pending asbestos-related personal injury claims against Fibreboard. The Substitute Ness Motley Agreement, by its terms, was subject to approval by the Court as fair and reasonable, and such approval was sought from this Court on August 5, 1993. On August 9, 1993, after reviewing the agreement itself and conducting a hearing in which this Court considered reports from the parties, from Professor Samuel Dash, and from Judge Higginbotham, this Court gave that approval.

After the conclusion of the Substitute Ness Motley Agreement, Judge Higginbotham addressed a letter to

this Court stating that "I am persuaded that given the momentum of this successful negotiation, you should consider directing counsel to proceed [to explore a settlement of future claims]," and observing that "we could have no better set of parties and counsel to attempt its passage." By statement on the record on August 9 and a formal order of August 11, 1993, this Court appointed Plaintiffs' Counsel to act as negotiating counsel on behalf of a class of future claimants who were exposed to Fibreboard asbestos-containing products and who may have contracted or might in the future contract an asbestos-related disease. Judge Higginbotham continued to serve as Settlement Facilitator.

Negotiations continued, and on August 22, 1993, Continental and Pacific reached an agreement, subject to approval of their respective boards of directors, with respect to equitable contribution rights. Under that agreement, Pacific agreed to share with Continental the costs of funding a global settlement, with Continental funding 65% and Pacific funding the remaining 35%.

Global settlement negotiations continued, and on August 22, 1993, Plaintiffs' Counsel rejected Continental's $1.3 billion offer to settle all future claims. On the night of August 23, 1993, Continental increased the Insurers' offer by $200 million to $1.5 billion, and indicated that it would be their final offer. The Insurers deemed that the $1.5 billion amount was an amount that would and should be acceptable to Plaintiffs' Counsel. Plaintiffs' Counsel rejected the offer and negotiations broke off.

The parties agreed to make one final attempt to settle before the submission of the *Coverage Case* appeal on August 27, 1993. The parties convened in Tyler, Texas on Thursday, August 26, 1993, for one final negotiating effort, with Court assistance in the discussions. After several hours of negotiations, Continental's counsel agreed to recommend to Continental an increase of $25

million and Fibreboard agreed to contribute $10 million remaining from its settlement with Home Insurance Company. The next morning, the Insurers agreed to this increase, and a global settlement amount of $1.535 billion was reached.

Despite this agreement on the price of the settlement, Plaintiffs' Counsel continued to insist throughout the day on August 27 on a number of additional non-price conditions to a deal. These included issues with respect to interest payments on the $1.525 billion contribution of the Insurers to the Settlement, timing of the payment of the Fibreboard $.0 million contribution, claims processing arrangements, the cut-off date for class membership (whether it should be the midnight preceding August 27 or the midnight yet to come), and, most significant, Plaintiffs' Counsel's insistence on a backup agreement between Fibreboard and the Insurers resolving the insurance dispute.

Throughout the negotiations that followed the meetings in Dallas the week of August 9, 1993, Plaintiffs' Counsel insisted that they would not agree to a global settlement unless Fibreboard and the Insurers would agree to a "backup" resolution of the *Coverage Case* that would become operative if for any reason a global settlement failed to achieve final court approval. Plaintiffs' Counsel were unwilling to permit a circumstance in which the Insurers might get a "free look" at the ultimate result in the *Coverage Case* while a global settlement was pending approval in the courts. The Insurers were unwilling to agree to such a condition unless such an agreement would cost them no more than a global settlement. This was resisted by Fibreboard, which contended that far more money would be required for defense costs outside the context of a global settlement to put Fibreboard in the same position it would be with a global settlement. The Insurers were nevertheless adamant that they would not agree to pay any more in the context of a backup agreement than in a global

agreement, and, late in the afternoon of August 27, 1993, Fibreboard acceded to this principle as the price of permitting an agreement to be reached with respect to a global settlement. The backup settlement is what is now referred to as the "Trilateral Settlement."

During the afternoon of Friday, August 27, 1993, as discussions continued, the parties were advised that the California Court of Appeal, at the oral argument on the last phase of the *Coverage Case* appeal, had indicated that it would rule on the appeal expeditiously. Although this acted as a further impetus for resolving remaining differences, not until five o'clock in the afternoon on August 27 — after this Court advised the parties that it would soon close for business — was agreement reached in principle on the basic terms of the global settlement now before this Court (the "Global Settlement").

F. THE GLOBAL SETTLEMENT AGREEMENT

The terms of the Global Settlement agreement in principle were announced on August 27 in open court, as follows: Continental and Pacific, on behalf of Fibreboard, would pay into an escrow account their respective shares (pursuant to their sharing agreement) of the cash equivalent of $1.525 billion, plus interest commencing on August 27, 1993, such payment to be made no later than January 1, 1994. In addition, Fibreboard would make a contribution of $10 million to the settlement. These funds would be used by the Trust to resolve — either through litigation or settlement — the asbestos-related personal injury and death claims of a non-opt-out class of persons who have neither filed nor settled such claims before August 27, 1993. The unsettled present cases against Fibreboard would also be identified, and an additional amount — not as of then determined — would be budgeted to resolve them. It was anticipated that to the extent the unsettled present cases could be resolved for less than the budgeted amount, 80% of the difference would be transferred to the Trust.

In addition, Fibreboard would assign to the Trust any and all claims for contribution and indemnity it might have against other joint tortfeasors arising out of certain asbestos-related personal injury claims. Fibreboard would also be responsible for the intake administration of claims for five years, and would be required to provide the Trust with all information — including information that would otherwise be protected by privilege or trade secret confidentiality — as is reasonably necessary for the Trust to evaluate, defend and resolve the claims against it. The Insurers would be responsible for the costs associated with obtaining court approval of the Global Settlement, as well as any fees of Plaintiffs' Counsel that might be awarded by this Court up to a maximum of 3% of the settlement amount, which fees would not be paid out of the Trust's funds.

As announced in this Court on August 27, 1993, in return for the monies to be paid under the Global Settlement, Fibreboard and the Insurers would receive "total peace" with respect to any and all claims, direct or indirect, involving the asbestos-related personal injury and death claims of the class members. The Global Settlement would also include the complete resolution of the insurance coverage dispute between Fibreboard and the Insurers. A prerequisite to presentation of the Global Settlement for court approval was the conclusion of a separate backup agreement between Fibreboard and the Insurers settling the insurance coverage litigation, and providing funds to Fibreboard to be used for the satisfaction of claims against Fibreboard in the event that the Global Settlement were not approved.

G. The Trilateral Settlement Agreement

On August 30, 1993, Fibreboard and representatives of the Insurers gathered in New York to work out the specific terms of the Trilateral Settlement, which was Plaintiffs' Counsel's precondition for negotiating the details of documenting the Global Settlement. Hard-fought and

contentious negotiations finally yielded an agreement whereby the Insurers would pay a total of $2 billion as a complete resolution of all liabilities under the policies: in effect, a complete policy buyout.

The terms of the Trilateral Settlement, and of a series of provisions amending the April 9 Agreement, were described to this Court on September 9. Plaintiffs' Counsel then filed the complaint in this action later that day. Papers seeking provisional certification of the plaintiff class in this action (the Global Health Claimant Class) and a temporary restraining order against the filing of additional claims against Fibreboard or the Insurers were also filed. This Court thereafter granted the motions for provisional class certification and for a temporary restraining order.

Fibreboard and the Insurers thereafter turned to formally documenting the Trilateral Settlement. Lengthy, hard-fought, arm's-length negotiations toward that end finally resulted in the signing of the Settlement Agreement (the "Trilateral Settlement Agreement") on October 12, 1993. Following the signing of the Trilateral Settlement Agreement, Plaintiffs' Counsel and representatives of Fibreboard and the Insurers turned to the negotiation and drafting of a written agreement reflecting the Global Settlement. Although the terms of the global agreement in principle had been put on the record on August 27, 1993, numerous detailed provisions that are contained in the fully documented agreement remained to be and were negotiated over a two-month period commencing in mid-October 1993. In addition, the "Third-Party Claimant Class Settlement" was negotiated during this time period. The formal documentation of the Global Settlement (the "Global Settlement Agreement"), as well as the Third-Party Claimant Class Settlement (entitled "Defendant Class Settlement Agreement" and now referred to as the "Third-Party Claimant Class Settlement Agreement"), were finalized, including the signatures of all the parties thereto, on December 23, 1993.

KEY SETTLEMENT TERMS

There are four settlement agreements before the Court for approval: the Global Settlement, the Global Third-Party Claimant Class Settlement, the Trilateral Settlement, and the Longshore Settlement. The Global Settlement is intended to settle all future asbestos-related personal injury claims against Fibreboard and its Insurers. In order to accomplish one of the primary goals of the Global Settlement — to get Fibreboard and the insurers out of the asbestos litigation business — some mechanism had to be developed for dealing with contribution and indemnity claims arising out of Global Health Claimant Class member claims against other asbestos defendants. The Global Third-Party Claimant Class Settlement addresses these issues. The Trilateral Settlement, which was negotiated as a back-up to the Global Settlement, is essentially a buy-out of the Continental and Pacific policies, which would provide Fibreboard with a $2 billion fund to settle or defend present and future asbestos claims against it. The Longshore Settlement was negotiated to foreclose the possibility that the Global Settlement might adversely affect the rights of Global Health Claimant Class members who are covered by the Longshore and Harbor Workers' Compensation Act (LHWCA) 33 U.S.C. § 901, et seq.

A. The Global Settlement

The Global Settlement settles all claims for asbestos-related personal injury or death against Fibreboard, Continental and Pacific by all members of the Global Health Claimant Class, and provides a structure for the handling of the proceeds of the $1.525 billion *Coverage Case* settlement and the additional $10 million to be contributed by Fibreboard. In addition, the Global Settlement Agreement discharges the Insurers from any obligations in connection with the insurance policies, whether with respect to asbestos-related personal injury and death claims or not, except for obligations

specifically assumed or preserved in the various agreements between them.

The purposes of the Global Settlement Agreement are: (i) to resolve finally all asbestos-related personal injury claims of the Global Health Claimant Class against Fibreboard and the Insurers, and to direct such claims to the Trust; (ii) to provide for a simple, efficient process by which persons who were injured through exposure to Fibreboard asbestos could quickly obtain a fair settlement or resolution of their claims while safeguarding the claimants' rights to proceed against the Trust in the tort system; (iii) to enhance the likelihood that assets would remain available to injured class members whose claims develop far in the future by limiting how much of the Trust's assets can be paid in any given year; (iv) to prioritize payments so that in the event of any shortfall the sickest claimants are paid first; and (v) to protect the Trust's assets from unduly risky investments.

Under the Global Settlement, Fibreboard, Continental and Pacific receive full releases from the members of the Global Health Claimant Class with respect to any asbestos-related personal injury or death claim, and all such claims will be directed to a Trust for processing and payment pursuant to the procedures set forth in the Trust Distribution Process ("TDP"). In order to receive compensation, claimants must first seek to settle with the Trust. If a settlement cannot be reached, the next step is mediation and then arbitration. If an acceptable resolution still cannot be reached, the claimant may then try the claim in the tort system, subject to the overall limit of $500,000 per claim.[7] Claims that are resolved against the Trust before resort to the tort system will be paid over three years; claimants who exercise their right to exit to the tort system after

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[7] **Punitive damages and prejudgment interest are not available to any claimant against the Trust.**

exhausting the specified claims processing procedures will be paid over as few as five years or as many as ten.

The TDP contains certain spendthrift provisions that limit the proportion of the Trust's assets that can be paid out in any given year to ensure that funds will be available to claimants who assert claims against the Trust years into the future. If funds prove insufficient in any given year to pay all claimants, claimants suffering from more serious diseases are generally paid before those with less severe injuries, and within categories of injuries those claimants waiting the longest are paid first.

B. THE THIRD-PARTY CLAIMANT CLASS SETTLEMENT

The terms of the Global Settlement Agreement are intended to provide the Insurers and Fibreboard with total protection with respect to claims arising from Global Health Claimant Class Member Claims, i.e., Global Third-Party Claims. Thus, the Global Settlement Agreement provides that it cannot be finally approved until the discharge of and injunction against Global Third-Party Claims are obtained.[8]

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8 The Global Settlement Agreement contains provisions that deal with the possibility of the Court being unable to issue an order barring all such Global Third-Party Claims against Fibreboard, Continental and Pacific, including an agreement by members of the Global Health Claimant Class to reduce, under certain circumstances, any judgments they obtain against Global Third-Party Claimant Class members in such amounts (up to but not in excess of the amount of the judgment against any such Global Third-Party Claimant Class member) as may be necessary to permit the Court to issue orders providing for the discharge of and injunctions against such Global Third-Party Claims as is required for the entry of Global Approval Judgment.

In response to objections from two potential Global Third-Party Claimant Class Members, the Commonwealth of Pennsylvania and the State of Rhode Island, the Settling Parties agreed that the fifty states of the United States (and their governmental units and divisions entitled to immunity under the Eleventh Amendment), and

(*concluded on page A-162*)

To this end, a settlement with respect to the claims of members of the Global Third-Party Claimant Class has been agreed upon by Owens-Illinois, as representative of the Global Third-Party Claimant Class, the Global Health Claimant Class representatives, Fibreboard and the Insurers. This settlement is embodied in the Third-Party Claimant Class Settlement Agreement. The Third-Party Claimant Class Settlement Agreement represents a resolution of all Global Third-Party Claims that could be asserted against Fibreboard, Continental or Pacific.

The Third-Party Claimant Class Settlement Agreement contains three principal provisions: (i) that the Global Third-Party Claimant Class will release Fibreboard and the Insurers as to any and all Global Third-Party Claims and agree that Global Approval Judgment shall bar and enjoin permanently Global Third-Party Claimant Class members from prosecuting any Global Third-Party Claims against Fibreboard or the Insurers; (ii) that Fibreboard and the Insurers will release the Third-Party Claimant Class as to any and all contribution or indemnification claims; and (iii) that members of the Third-Party Claimant Class will have the rights set forth in Section H of the TDP.

Section H, in turn, affords different rights in three different scenarios that can arise. First, where a personal injury claimant liquidates his or her claim against the Trust before obtaining a judgment against a Global Third-Party Claimant Class member, the class member receives a reduction of any judgment subsequently

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(*continued from page A-161*)

governments of foreign nations (and units and divisions thereof) entitled to sovereign immunity are not subject to the Court's jurisdiction. The Global Settlement Agreement was therefore amended to provide that Global Health Claimant Class members will reduce judgments in their favor against such entities in such amounts as may be necessary to extinguish any such Global Third-Party Claims under applicable law.

entered against it to reflect the personal injury claimant's recovery from the Trust, in whatever amount is dictated by the set-off, contribution, indemnity or similar principles of the applicable state law. Second, where a personal injury claimant exhausts the Trust process and litigates against the Trust in the tort system, and also files suit against a Global Third-Party Claimant Class member, the class member likewise receives a judgment reduction, in whatever amount is dictated by the applicable state law, for any joint-and-several portion of any judgment against it reflecting Fibreboard's liability share. Third, where a personal injury claimant obtains a judgment against a Global Third-Party Claimant Class member prior to liquidating his or her claim against the Trust, and the Global Third-Party Claimant Class member pays the joint-and-several portion (if any) of that judgment, it succeeds to whatever rights the personal injury claimant would have had against the Trust.[9]

The salient feature of the Third-Party Claimant Class Settlement is thus that it preserves all rights the Global Third-Party Claimant Class member would possess as against the Trust under applicable law in those cases where a personal injury claimant recovers from the Trust first; and it affords the Global Third-Party Claimant Class member all of the personal injury claimant's rights against the Trust (with the minor exception of the right to exit to the tort system) in those cases where such a claimant recovers from the class member first. For this reason, the Third-Party Claimant Class Settlement affects Global Third-Party Claimant Class members principally in that their contribution and indemnification claims will be addressed through set-offs and subrogation rights stemming from

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9 There is one exception: if the class member were not satisfied with the Trust's offer, it — unlike a personal injury claimant against the Trust — would not be permitted to exit to the tort system; the matter would instead be resolved through binding arbitration.

settlements and proceedings involving the Trust, rather than Fibreboard or the Insurers.

The Third-Party Claimant Class Settlement provides a substantial benefit to Global Third-Party Claimant Class members. By facilitating the Global Settlement, the Third-Party Claimant Class Settlement creates a trust with over $1.5 billion available to pay claims and, in accordance with applicable law, to offset obligations of members of the Global Third-Party Claimant Class. Very few objections to the Third-Party Claimant Class Settlement have been asserted.

In addition, the Third-Party Claimant Class Settlement provides a reasonable, reliable, fair and predictable mechanism to handle third-party claims. Because the Third-Party Claimant Class Settlement avoids intensive litigation of the sort that occurred in the *Manville* proceedings, the complexities of attempting to create a new rule in the tort system, and the uncertainties of leaving third-party issues to further litigation, this Court finds that the Third-Party Claimant Class Settlement is better than any alternative.

The Third-Party Claimant Class Settlement Agreement was the product of negotiations among Plaintiffs' Counsel, Fibreboard and representatives of the major asbestos manufacturers. These negotiations were sophisticated, arm's-length and non-collusive. Indeed, these negotiations resolved an issue that has been the subject of contentious disputes in other asbestos-related settlement proceedings, such as *Georgine* and *Manville*.

The overwhelming credible testimony demonstrates that the Third-Party Claimant Class Settlement Agreement is fair, reasonable and adequate, and that its benefits far outweigh the incidental restrictions it places on members of the Global Third-Party Claimant class.

C. The Trilateral Settlement

The Trilateral Settlement Agreement, settles the insurance coverage disputes between Fibreboard and the Insurers whether or not the Global Settlement is approved or successfully withstands subsequent attack. The Trilateral Settlement Agreement provides that, upon specified court determinations, Continental and Pacific shall be discharged from any further obligations or liabilities to Fibreboard or to any other person or entity under or in connection with the insurance policies issued to Fibreboard whether asbestos-related or not (except for obligations that an Insurer has specifically assumed or preserved under the Trilateral Settlement Agreement, the April 9 Agreement, the Global Settlement Agreement or the Supplemental Agreement). The Trilateral Settlement Agreement does not, however, preclude the assertion of any such claims against Fibreboard. In addition, the Trilateral Settlement Agreement provides for Fibreboard to indemnify Continental and Pacific against certain further asbestos-related personal injury claims whether or not the Global Settlement is approved or successfully withstands collateral attack.

If the Global Settlement is not approved but the Trilateral Settlement is approved, the $1.525 billion plus interest from the Insurers, plus an additional $475 million, less certain deductions, will be made available to Fibreboard, either directly or through a trust, to enable Fibreboard to pay defense costs and claims with respect to asbestos-related personal injuries — not only claims not filed or settled prior to August 27, 1993, but also asbestos-related personal injury claims against Fibreboard that were unsettled as of August 23, 1993. Fibreboard may also use up to $65 million from these funds for costs associated with asbestos-related property damage claims and non-asbestos claims.

The Trilateral Settlement was the result of hard fought, arm's-length negotiations between Fibreboard and Continental. The negotiations leading to the Tri-

lateral Settlement were intense and contentious, and there is a complete absence of evidence of collusion in connection therewith. The Court is satisfied that the Trilateral Settlement is fair and reasonable.

D. THE LONGSHORE SETTLEMENT

On December 5, 1994, the Global Health Claimant Class representatives, on behalf of themselves and the Global Health Claimant Class, Bethlehem Steel Corporation, on behalf of itself and a class of employers and insurance carriers (the Longshore Defendant Class), and the Director, Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), entered into a settlement with respect to certain rights and obligations that members of the Global Health Claimant Class and members of the Longshore Defendant Class might have under the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. §§ 901, et seq., and related statutes.

LHWCA provides that if a person entitled to compensation under LHWCA settles a claim against a third-party for which he or she would be entitled to receive Longshore benefits for less than the LHWCA compensation, the employer is liable for compensation only if the person entitled to benefits first obtained approval of the settlement from the employer and the employer's insurance carrier. 33 U.S.C. § 933(g)(1). If the person entitled to compensation obtains a judgment or settles a claim for more than the LHWCA compensation, the person entitled to benefits is required to notify the Longshore Employer of the judgment or settlement. 33 U.S.C. § 933(g)(2). Failure to comply with § 933(g)(2)'s notice requirements terminates the employer's obligation to pay Longshore benefits.

Plaintiffs' Counsel, the Secretary of Labor, and certain intervenors with potential LHWCA claims were concerned that Longshore employers might assert that the Global Settlement and related judgment constitute

either a settlement under § 933(g)(1) or (g)(2) or a judgment under § 933(g)(2) for which the applicable notice or pre-approval requirements had not been satisfied.

Bethlehem agreed to serve as a representative of a class of Longshore employers. Bethlehem consulted with other Longshore employers during the course of negotiations, and eventually a settlement was reached between Bethlehem and the settling parties in which it was agreed that the final approval of the Global Settlement would not constitute a "settlement" under 33 U.S.C. § 933(g) which would operate to create a forfeiture of LHWCA compensation rights by Global Health Claimant Class members against the Longshore Defendant Class and that Longshore Defendant Class members would have the right (i) to obtain liens or credits; (ii) to receive notice and an opportunity to approve settlements; and (iii) to be informed of judgments and arbitration awards when Global Health Claimant Class members pursue claims against the Trust.

On February 2, 1995, the Court conducted a hearing on the fairness of the Longshore Settlement. No Longshore Defendant Class member or Global Health Claimant Class member appeared at the hearing to voice objections to the settlement, and no Longshore Defendant Class member filed written objections to the settlement. The Longshore Settlement clears a potential obstacle to final approval to the Global Settlement, which in turn potentially reduces the net obligations of members of the Longshore Defendant Class to members of the Global Health Claimant Class. The Court finds the Longshore Settlement to be fair and reasonable.

JURISDICTION

This Court has subject matter jurisdiction over these proceedings pursuant to 28 U.S.C. § 1332. Diversity of citizenship is present and is uncontested, but the Ortiz

Intervenors contend that § 1332's amount-in-controversy requirement is not satisfied.

For diversity jurisdiction to exist, the amount-in-controversy requirement — allegations of damage in excess of $50,000 — must be satisfied. 28 U.S.C. § 1332(a).

In determining the amount in controversy, "the sum claimed by the plaintiff controls . . . [unless it] appear[s] to a legal certainty that the claim is really for less than the jurisdictional amount." *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 590, 82 L.Ed. 845 (1938). Although the plaintiffs bear the burden of proving the requisite amount in controversy, the burden is not a heavy one, and the plaintiff need demonstrate only that it is not impossible that he or she will recover more than $50,000. See *Seafoam, Inc.* v. *Barrier Systems, Inc.*, 830 F.2d 62, 66 (5th Cir. 1987). In determining the amount in controversy, claims for punitive damages must be included in the computation. See *Bell* v. *Preferred Life Assurance Soc.*, 320 U.S. 238, 240, 64 S.Ct. 5, 6, 88 L.Ed. 15 (1943). The amount-in-controversy requirement is satisfied because each Class member could lawfully allege damages in excess of $50,000.

The amount-in-controversy requirement may be satisfied in mass-tort class actions, including class actions consisting partly or entirely of people who had not, at the time of filing, manifested any symptoms, illness or injury. See, e.g., *In re Joint E. & S. Dist. Asbestos Litigation ("Manville")*, 982 F.2d 721, 734 (asbestos: amount-in-controversy requirement satisfied although some members were "exposure only"); *Carlough* v. *Amchem Prods. Inc.*, 834 F.Supp. 1437, 1456-62 (E.D. Pa. 1993) (asbestos: same); *In re A. H. Robins Co.*, 880 F.2d 709, 725 (4th Cir.) (Dalkon Shield: "indisputable that it cannot be said to a 'legal certainty' that the jurisdictional amount herein was not satisfied" where the class included women who had used the shield but who had not yet manifested an

injury), *cert. denied*, 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1434 (2d Cir. 1993) (*Agent Orange*), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1125, 127 L.Ed.2d 434 (1994). Those members of the Global Health Claimant Class who have been exposed to asbestos, but who have not yet developed recognizable disease or injury, seek, *inter alia*, damages to compensate for fear of cancer and for enhanced risk of developing cancer, damages tied to the need to undergo medical monitoring to detect the early development of asbestos-related disease, and punitive damages. Each Global Health Claimant Class member, including each so-called "exposure-only" claimant, has a good faith basis for arguing for application of authorities permitting recovery for fear of cancer, risk of cancer and medical monitoring. See, e.g., *Potter* v. *Firestone Tire and Rubber Co.*, 6 Cal.4th 965, 25 Cal. Rptr.2d 550, 570-71, 863 P.2d 795, 816 (1993); *Miranda* v. *Shell Oil Co.*, 17 Cal.App.4th 1651, 26 Cal.Rptr.2d 655 (1993); *Barras* v. *Monsanto Co.*, 831 S.W.2d 859 (Tex.App. — Houston [14 Dist.] 1992, *writ denied*). Fibreboard's headquarters are located in California, a state that recognizes claims for medical monitoring and fear of cancer. Accordingly, such claims could be asserted against Fibreboard by all members of the Global Health Claimant Class.

Furthermore even if some class members could not allege damages in excess of $50,000, the Court would still have jurisdiction because all the Class representatives could lawfully allege damages in excess of $50,000. In a class action, so long as the class representatives meet the amount-in-controversy requirement, all other class members fall within this Court's supplemental jurisdiction, regardless of the value of their claims. Moore's Federal Practice, ¶ 0.97[5], at 928 (2d ed. 1994); 2 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 6.11, at 6-48 (3d ed. 1992).

CLASS ACTION PREREQUISITES

A. Rule 23(a) Prerequisites

Rule 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law and fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. A class may be certified if all four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure are met and one or more of the provisions of Rule 23(b) is satisfied. "The district court has wide discretion in deciding whether or not to certify a proposed class." *Jenkins* v. *Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986).

Rule 23 requirements apply to all federal class actions; however, a number of courts have held that they are often more readily satisfied in the settlement context because the issues for resolution by the Court are more limited than in the litigation context. See *In re A. H. Robins Co.*, 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir. 1989); *Officers for Justice* v. *Civil Service Comm'n of City and County of San Francisco*, 688 F.2d 615, 633 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217, 103 S.Ct. 1219, 75 L.Ed.2d 456 (1983); *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992), appeal dismissed without op., 995 F.2d 1066 (6th Cir. 1993); see also *2 Newberg on Class Actions* § 11.28 (3rd ed. 1992). Courts have approved settlements and finally certified settlement classes while at the same time holding that class certification for litigation purposes might be improper. See, e.g., *Officers for Justice*, 688 F.2d at 633; *In re Anthracite Coal Antitrust Litigation*, 79 F.R.D. 707, 713-14 (M.D. Pa. 1978) (court approved class settlement while noting that certification for litiga-

tion purposes would be doubtful), *aff'd in part without op. and vacated in part without op. sub nom. Colonial Fuel Co.* v. *Blue Coal Corp.*, 612 F.2d 571 (3d Cir. 1979) (table); *Wilkes-Barre Steam Heat Co.* v. *Blue Coal Corp.*, 612 F.2d 576 (3d Cir. 1979) (table). Other Courts have held that Rule 23 prerequisites may not be relaxed merely because a settlement class is involved rather than a litigation class. See *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 799 (3rd Cir. 1995). This Court approaches the Rule 23(a) prerequisites under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context.

Rule 23(a) provides that a class action may be brought if: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

1. Numerosity

The numerosity requirement of Rule 23(a) is obviously satisfied. With Class membership numbering in the hundreds of thousands, joinder of the Class members' claims would plainly be impracticable. See *Boykin* v. *Georgia-Pacific Corp.*, 706 F.2d 1384, 1386 (5th Cir. 1983), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 999, 79 L.Ed.2d 231 (1984) (317-member class met numerosity requirement).

2. Commonality

Rule 23(a) requires that there be at least one legal or factual issue common to all class members. See 3B J. Moore and J. Kennedy, *Moore's Federal Practice* ¶ 23.06-1, at 23-159-23-160 (2d ed. 1993); Jenkins, 782 F.2d at 472 ("The threshold of 'commonality' is not high," as "the rule requires only that resolution of the common ques-

tions affect all or a substantial number of the class members"); *Walker* v. *Jim Dandy Co.*, 638 F.2d 1330, 1336 (5th Cir. 1981). That requirement has been met. All Class members here have an overriding common interest in eliminating the risk posed by the coverage litigation and creating a substantial fund of insurance proceeds to provide compensation for Class members. Consequently, many major issues presented by the Class are common to all of its members, including whether claimants against Fibreboard have a right to substantial insurance proceeds notwithstanding the existence of a coverage dispute; and whether some curtailment of the Class's rights in the tort system is appropriate in order to enable a resolution of the coverage dispute that equitably distributes the insurance proceeds. See *Georgine*, 157 F.R.D. at 316; *2 Newberg on Class Actions* § 11.28, at 11-58–11-60. See also *Jenkins*, 782 F.2d at 473 (affirming class certification of limited issues including liability but not damage and causation).

3. Typicality

"The 'typicality' requirement focuses . . . on the similarity of the legal and remedial theories behind [the named and unnamed plaintiffs'] claims." *Jenkins*, 782 F.2d at 472. Consequently, in the settlement context, it "requires proof that the interests of the class representatives and the class are commonly held for purposes of receiving similar or overlapping benefits from a settlement." *2 Newberg on Class Actions* § 11.28, at 11-58. The requirement may be met even though "[t]he degree of harm may differ between the representatives and members of the class according to the degree of exposure (if any), the effects of the asbestos disease process, and the nature of the disease contracted by the individual." *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 272 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986); see also *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 817 (3rd Cir. 1995) (noting that individual issues of cau-

sation, reliance, and damages do not ordinarily preclude class action treatment of mass torts); *Ladd* v. *Dairyland County Mut. Ins. Co.*, 96 F.R.D. 335, 337 (N.D. Tex. 1982). The legal and remedial theories of the representative plaintiffs are typical of the Class. All Class members' claims arise from exposure to asbestos for which Fibreboard may bear legal liability, and all Class members share the following common interests: (i) avoiding the potentially disastrous results of a loss by Fibreboard in the *Coverage Case* appeal; (ii) maximizing the total settlement contribution from Fibreboard and the Insurers; (iii) streamlining the procedures for the filing, processing and resolution of claims, and thereby reducing transaction costs and delays in compensation; (iv) minimizing the percentage of their compensation diverted from them to pay attorneys' fees; and (v) adopting procedures that provide for payments to claimants in an equitable manner.

4. Adequacy of Representation

The adequacy requirement contains two elements: "The first concerns the qualifications of counsel, and the second concerns the relationship between the interests of the class representatives and the interests of the other class members." Jenkins, 109 F.R.D. at 273.

a. Class Counsel

Class Counsel are highly competent, skilled and experienced members of the plaintiffs' asbestos bar, were well qualified to serve as Class Counsel in this case, and the Court is satisfied that Class Counsel adequately represented the class.

The Ortiz Intervenors contend that Class Counsel's representation was inadequate due to a conflict created by their representation of present claimants at the same time they were negotiating on behalf of the Class. The Court is satisfied that any potential conflicts that could theoretically have arisen between Class Counsel's present claimants and the Class never materialized. Indeed,

given the short window of opportunity to negotiate a global settlement created by the *Coverage Case* appeal, the Court finds it unlikely that counsel less intimately involved with Fibreboard's overall asbestos problem could have reached nearly so favorable a settlement for the Class.

The Ortiz Intervenors also contend that the negotiation of an attorneys' fee agreement more or less at the same time as the negotiation of the Global Settlement taints Class Counsel's representation of the Class.

When fee and settlement negotiations occur simultaneously, there is a danger of collusion between class counsel and the defendant. *In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d at 803. In the instant case, however, there is considerably less to the agreement than meets the eye. As a part of the Global Settlement Agreement, the Insurers agreed to fund an attorneys' fee award in addition to the settlement fund in an amount set by the Court up to 3% of the total settlement. Continental was willing to bear the costs of administering the settlement, but it was not willing to fund attorneys fees up to the 25% sometimes awarded class counsel in securities fraud class actions. Class Counsel understood, and Judge Higginbotham made clear to them during the negotiations, that they could not expect that any particular fee would be awarded. There is nothing about the fee agreement that would lead the Court to believe that Class Counsel's representation of the Class was in any way compromised.

b. Class Representatives

The Class representatives have also adequately represented the Class. Class representatives satisfy the adequacy requirement unless they have "an insufficient stake in the outcome or interests antagonistic to the unnamed members." *Jenkins*, 782 F.2d at 472; see also *Georgine*, 157 F.R.D. at 317 ("The key question is whether

their interests are *antagonistic*.") (quoting *Steiner* v. *Equimark Corp.*, 96 F.R.D. 603, 610 (W.D. Pa. 1983)) (emphasis in original). And "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes." *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195, 208 (5th Cir. 1981).

The Class representatives have a sufficient stake in the outcome, and the interests of the Class representatives and the members of the Class are not antagonistic. The Class representatives span the range of the various medical categories under the Trust Distribution Process and include both already-impaired and not-yet-impaired claimants. The Class representatives and the members of the Class — all of whom are equally at risk in the coverage litigation — are united in seeking the maximum possible recovery for their asbestos-related claims. See *Jenkins*, 109 F.R.D. at 274.

The Class representatives played a sufficient role in the action, notwithstanding that they were named after the agreement in principle was reached and that they relied on Class Counsel in the subsequent settlement negotiations. "It is not a requirement that representative plaintiffs have specific knowledge of the claims and issues in the action, or that they play a personal role in the direction and management of the action." *Georgine*, 157 F.R.D. at 317. See *Longden* v. *Sunderman*, 123 F.R.D. 547, 558 (N.D. Tex. 1988) (the law well recognizes that, in "complex" matters, "it is unreasonable to expect the class representatives to possess detailed, personal knowledge"); *Gibb* v. *Delta Drilling Co.*, 104 F.R.D. 59, 77 (N.D. Tex. 1984). "[T]he primary criterion for determining whether the class representative has adequately represented his class . . . is whether the representative, *through qualified counsel*, vigorously and tenaciously protected the interests of the class." *Gonzales* v. *Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973) (emphasis added);

accord, *Longden* v. *Sunderman*, 123 F.R.D. at 559; *Durrett* v. *John Deere Co.*, 150 F.R.D. 555, 558 (N.D. Tex. 1993).

B. RULE 23(b)(1)(B)

Rule 23(b)(2)(B) of the Federal Rules of Civil Procedure provides that a class action may be maintained if the prerequisites of subdivision (a) of Rule 23 are satisfied, and in addition "the prosecution of separate actions by or against individual members of the class would create a risk of . . . adjudication with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

Rule 23 is to be interpreted according to its "plain meaning." See, e.g., *Pavelic & LeFlore* v. *Marvel Entertainment Group, Div. of Cadence Indus. Corp.*, 493 U.S. 120, 123, 110 S.Ct. 456, 458, 107 L.Ed.2d 438 (1989). As used in the Rule, the requisite "risk" of impairment need not be a certainty or even a better — than 50% likelihood. Instead, the term "risk" refers only to a "substantial probability," which has been described as — "more than a mere possibility" but "less than a preponderance." *In re Joint Eastern and Southern Dist. Asbestos Litigation ("Manville")*, 129 B.R. 710, 765, *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993); *accord In re Granada Partnership Sec. Litigations*, 803 F.Supp. 1236, 1244 (S.D. Tex. 1992); *In re Joint Eastern and Southern Dist. Asbestos Litigation ("Eagle-Picher")*, 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990); *In re First Commodity Corp. Customer Accounts Litigation*, 119 F.R.D. 301, 312 (D. Mass. 1987); *Jenkins*, 109 F.R.D. at 276-77; *In re Jackson Lockdown/MCO Cases*, 107 F.R.D.. 703, 713 (E.D. Mich. 1985); *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 726 (E.D.N.Y. 1983), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 647 (1988).

No one disputes that there was a significant risk — more than a mere possibility — that Fibreboard would lose on one or more issues in the *Coverage Case*, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program. The Court heard expert testimony regarding the risks, and the risk inherent in Fibreboard's insurance dispute is further reflected in the fact that Fibreboard's settlement average under its no-cash assignment settlement program was more than twice its the settlement average under the 40% cash SSP. The risk that available funds could be inadequate to pay all claims constitutes a risk of substantial impairment under Rule 23(b)(1)(B).

The need to protect Class members' "common interests" in the insurance proceeds subject to the coverage dispute demands a unitary resolution permitting equitable distribution. Numerous courts applying Rule 23(b)(1)(B) have certified classes under the Rule where allowing separate actions would have created a risk that early individual adjudications would have exhausted all available assets. See, e.g., *Manville*, 982 F.2d at 738-39; *In re Drexel Burnham Lambert Group*, 960 F.2d 285, 292 (2d Cir. 1992), cert. dismissed, ___ U.S. ___, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *In re Silicone Gel Breast Implant Products Liability Litigation (MDL 926)*, CV 93-P-11433-S (N.D. Ala., June 1, 1993); *In re Granada*, 803 F.Supp. at 1244; Eagle-Picher, 134 F.R.D. at 35; *County of Suffolk* v. *Long Island Lighting Co.*, 710 F.Supp. 1407, 1418 (E.D.N.Y. 1989), *aff'd*, 907 F.2d 1295 (2d Cir. 1990); *Bush* v. *Rewald*, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,999, 1986 WL 15338 (D. Haw., Sept. 4, 1986); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 712-13 (E.D. Mich. 1985); *Coburn* v. *4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977). See also *Jenkins* v. *Raymark Indus., Inc.*, 109 F.R.D. 269, 276 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986) ((b)(1)(B) certification is appropriate where "the brink of insolvency will be reached during the litigation").

The Global Settlement resolves both the insurance coverage dispute between Fibreboard and the insurers, and the claims of all class members against Fibreboard and the insurers. The Global Settlement involves a uniquely situated defendant in a mass tort that has created unparalleled problems for the courts and the litigants. The Global Settlement resulted from a unique set of circumstances not likely to be repeated. Resolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised. On these facts, allowance of individual adjudications by class members would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses — a situation that falls squarely under Rule 23(b)(1)(B). See *In re Jackson Lockdown*, 107 F.R.D. at 708, 712; *In re A. H. Robins*, 85 B.R. at 380.

Whether mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute is not a question this Court need answer here. In such a case, if the settlement failed because separate actions were permitted, the defendant would retain the settlement funds (or the insurance coverage), and there might not be the "impair[ment]," to class members' "ability to protect their interests" required for mandatory class certification by Rule 23(b)(1)(B), so long as the defendant has adequate funds to pay all class members' claims. The destruction of the settlement fund here, however, constitutes a "risk" within the meaning of Rule 23(b)(1)(B) because the source of that fund (and any meaningful recovery for the Class) is a non-defendant whose obligations are seriously in doubt and may well disappear entirely if the settlement were to fall through — with the result that Class members could not then secure their due through litigation.

The Ortiz Intervenors and the Flanagan Intervenors object that this class action cannot be maintained under Rule 23(b)(1)(B), alleging that there is no genuine "limited fund" because Fibreboard is allowed to retain most of its non-insurance assets under the settlement. The objection is misplaced for two reasons. First, although the limited fund situation is commonly associated with Rule 23(b)(1)(B), the Rule itself does not require a limited fund. Second, even under a limited fund analysis, and there is a limited fund in this case, see Conclusions of Law ¶¶ 37-39, the fact that Fibreboard retains most of its equity under the Global Settlement is irrelevant to the propriety of mandatory class certification. The Court need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; the Court need only determine whether the amount recovered by the class is fair. *Drexel*, 960 F.2d at 293. There is no authority or reason why Class Counsel may settle a 23(b)(1)(B) class action only if all of the defendant's resources are included in the settlement. Such a rule would make no sense, would discourage settlements and has been rejected. See, e.g., *In re Granada*, 803 F.Supp. at 1244; *Bush*, [1986-87 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 92,999. In terms of the expected recovery for class members, the Global Settlement is far superior to either the Trilateral Settlement or to no settlement at all.

FAIRNESS ISSUES

Federal Rule of Civil Procedure 23(e) requires the Court to determine whether a class action settlement is "fair, adequate, and reasonable." *Parker* v. *Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828, 103 S.Ct. 63, 74 L.Ed.2d 65 (1982); *In re Corrugated Container Antitrust Litigation*, 643 F.2d at 207. The Court cannot modify the terms of the proposed settlement; rather, the Court must approve or disapprove of the proposed settlement "as a whole." See, e.g., *Evans* v. *Jeff D.*, 475

U.S. 717, 727, 106 S.Ct. 1531, 1537, 89 L.Ed.2d 747 (1986); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977). There is a strong presumption in favor of the settlement's fairness. *Parker*, 667 F.2d at 1209; *Cotton* v. *Hinton*, 559 F.2d at 1331; *Mashburn* v. *National Healthcare, Inc.*, 684 F.Supp. 660, 667 (M.D. Ala. 1988); *Manual for Complex Litigation*, § 30.41 (2nd ed. 1985).

The proposed settlement is not required to "achieve some hypothetical standard constructed by imagining every benefit that might someday be obtained in contested litigation." *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 850 (5th Cir. 1975). Rather, "compromise is the essence of settlement," and the Court may "rely upon the judgment of experienced counsel for the parties." *Cotton*, 559 F.2d at 1330 (some citations omitted).

A. THE REED FACTORS

The Fifth Circuit has set forth six factors to guide the Court's assessment of the fairness, reasonableness and adequacy of a proposed class-action settlement:

> (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives and absent class members.

Reed v. *General Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). All factors support approval of the Global Settlement here.

Asbestos litigation is undoubtably the most "mature" of all mass tort litigation. The primary factual and legal issues such as disease causation, product, jobsite and

defendant identification and standard of care have been identified and developed through extensive litigation. Despite the maturity of asbestos litigation, it continues to be expensive, time-consuming, and complex. The problem now is that asbestos litigation has become over-mature. Issues that have already been fully developed and resolved are nonetheless rehashed and relitigated, all contributing to the delay, high transaction costs, and arbitrary results that have become the hallmarks of asbestos litigation.

At the time the Global Settlement was reached, Class Counsel were thoroughly familiar with asbestos litigation in general and with Fibreboard's situation in particular, and were extremely well-equipped to represent the interests of the Class. The Global Settlement was the result of hard fought, arm's-length negotiations among the Settling Parties. Indeed, those negotiations were frequently contentious and even bitter. At numerous points the negotiations broke down and were almost scuttled entirely. Not until December 23, 1993, when the written Global Settlement Agreement was signed, was it clear that a final agreement would actually be reached. The record contains no evidence of collusion, and establishes that the Global Settlement amount of $1.535 billion is well within the range of values the Court could properly approve as a fair and reasonable compromise. Very few objections to the settlement have been asserted, despite the extremely extensive notice campaign that was conducted in connection with it, at a cost of more than $22 million. It is highly unlikely that the Insurers or Fibreboard would have agreed to pay more than the amounts they agreed to pay in the Global Settlement, and the Court is satisfied that the Global Settlement is fair, reasonable and adequate.

B. THE ALTERNATIVES

It is appropriate in assessing the fairness of a class settlement to compare the risks and rewards of the

Global Settlement with other possible outcomes. While there is no way to predict Fibreboard's future asbestos liability with any certainty, the Court can, based on the work of the experts and the views of counsel, assess the risks to the Class associated with each of the three basic "scenarios" that are presented by the record: the "*Coverage Case* scenario"; the "Trilateral Settlement scenario"; and the "Global Settlement scenario."

The *Coverage Case* scenario assumes that neither the Global Settlement nor the Trilateral Settlement receives final court approval and the *Coverage Case* is prosecuted to a conclusion in the California courts. Under this scenario, there is a significant risk that Fibreboard will be left either with no relevant insurance coverage at all or with coverage for only a small fraction of its total asbestos-related personal injury liability. In that event, Fibreboard would at best be able to meet only a small portion of its total liability to the Global Health Claimant Class, and that allowance of individual, "first come, first served" actions and adjudications with respect to Global Health Claimant Class members' claims would rapidly exhaust all available assets and would leave the great bulk of the class uncompensated.

Even a total win in the *Coverage Case* would not guarantee that the Class would be fully compensated. There is a significant risk that Fibreboard's assignment settlement program may have entirely vitiated the Continental insurance, which would leave Fibreboard with only several hundred million dollars to cover both pre- and post-1959 claims. Any such outcome would guarantee, again, a massive shortfall in funds to compensate the Global Health Claimant Class — and therewith a substantial misallocation of Fibreboard's resources in the event individual actions and adjudications with respect to class member claims were permitted.

And even if Fibreboard were to win in the *Coverage Case* and Fibreboard's right to engage in the assignment settlement program were upheld so that Fibreboard had unlimited coverage for pre-1959 cases, the post-1959 cases, for which Fibreboard would be solely responsible, would sooner or later drive Fibreboard into bankruptcy. Transaction and indemnity costs would quickly consume Fibreboard's relatively modest assets. If Fibreboard were able to obtain the necessary court orders to effect the Pacific II Agreement, its demise might be delayed a few years, but it would not be averted. Fibreboard's bankruptcy would be a disaster for the post-1959s, and for the pre-1959s it would prove to be at least a major and expensive inconvenience.

In comparing the *Coverage Case* scenario with the Trilateral Settlement, the question is whether — from the standpoint of class members — it is preferable to (i) accept the known terms and benefits of the Trilateral Settlement (foremost of which is a $2 billion payment to Fibreboard from the Insurers); or (ii) gamble on both the outcome of the *Coverage Case* appeal and the possibility, regardless of the outcome of that appeal, that Fibreboard would be found to have vitiated its coverage under the Continental policy by its assignment settlement program. Given the extent of those risks, and — given Fibreboard's limited non-insurance assets — the devastating effect that such outcomes would have on class members, the Trilateral Settlement is superior to no settlement at all.

Although the Trilateral Settlement scenario eliminates the risk of the *Coverage Case*, it is nevertheless problematical for the Global Health Claimant Class. There is a significant risk that the Trilateral Settlement (even augmented by Fibreboard's non-insurance assets) would leave a "late-comer" component of the Class without compensation in the event individual actions and

adjudications with respect to class member claims were to be permitted.

Under the Global Settlement scenario, although there are substantial uncertainties involved, and although there is a significant risk — more than a mere possibility — that there will be a shortfall, all Class claims will more likely than not be paid at fair and appropriate values, although it is possible some claims may have to be deferred for some time pursuant to the spendthrift provisions of the Trust.

The funds provided under the Global Settlement are approximately equivalent to the funds available to resolve those claims under the Trilateral Settlement, after allowance is made for resolution of unsettled present claims and other items under the Trilateral Settlement. Under the Trilateral Settlement, however, Fibreboard's non-insurance assets are reachable by asbestos claimants. But this does not mean that more money will actually reach asbestos claimants under the Trilateral Settlement. Fibreboard's total sale value free of all its asbestos liabilities is only $235 million, which is considerably less than the likely savings in defense costs under the Global Settlement. In fact, taking into account the substantially lower transaction costs under the Global Settlement, the Global Settlement will provide substantially more money — at least hundreds of millions of dollars — that actually reaches class members for compensation of their claims than will be provided to them under the Trilateral Settlement. And although there is some risk under the Global Settlement that there will be insufficient funds to compensate all class members, under the Trilateral Settlement there is a substantial likelihood that the funds will be insufficient to compensate all class members. Under the Global Settlement, the operation of the Trust will result in a far more cost-effective system that promotes the settlement of claims rather than the defense of them. If

the Global Settlement is not ultimately approved, the only winner will be the asbestos litigation industry — lawyers on both sides, doctors, consultants, other expert witnesses, etc. — which has historically consumed as much as 63 cents of each asbestos litigation dollar. See Institute for Civil Justice Annual Report, April 1, 1990-March 31, 1991 (RAND).

Under the efficient claims administration and resolution procedures of the Trust, all transaction costs would likely constitute less than 15% of total Trust outlays. Under the Trilateral Settlement, there is a substantial likelihood that Fibreboard would spend a significant portion of the monies made available to it pursuant to the Trilateral Settlement on defense costs in an effort to achieve its litigation goals. Indeed, in the initial years under the Trilateral Settlement regime it is likely that Fibreboard would expend more of the Trilateral Settlement funds on defense costs than on indemnity payments to claimants.

Moreover, under the Global Settlement, claimants' attorneys' fees are limited to 25% of a claimant's recovery against the Trust — in contrast to the 33%-40% fees claimants' attorneys would often recover under the Trilateral Settlement — thus increasing the compensation that is provided to claimants rather than to their lawyers.

Additionally, under the Global Settlement, the operation of the Trust will result in a far more efficient and equitable system of administering claims and compensating claimants. A claim against the Trust will, on average, be processed and resolved much more quickly than a similar claim would be processed and resolved in the tort system under the Trilateral Settlement. As or more importantly, operation of the Trust under the Global Settlement will provide a fair method for compensating claimants that is more efficient and less burdensome than those claimants would experience under the tort system.

CONCLUSION

In sum, the Global Settlement, like all of the settlements involved in this action, is fair, reasonable, and adequate, and inheres to the substantial benefit of its subject class. The Global Settlement is the product of hard-fought arms-length negotiations by competent counsel, and the amount of the settlement is easily within the range of values that the Court could approve. Under the facts of this case, a mandatory, non-opt-out class action is not only an appropriate vehicle to effect the settlement, it is the only way that the settlement could be accomplished. The Global Settlement is better both for the Class and for Fibreboard than the Trilateral Settlement, and both the Global Settlement and the Trilateral Settlement are far superior to the *Coverage Case* scenario. This Court sees no reason why the Global Settlement should not be approved.

The Court on this date also enters its Findings of Fact and Conclusions of Law and the various judgments that collectively reflect the Court's approval of the Global Settlement. What remains is for the Court to review the Report and Recommendation of the magistrate judge regarding attorneys' fees and any objections that may be lodged against it.

The Court would be remiss if it did not note that the attorneys for Fibreboard, Continental, Pacific, the Class, the Ortiz Intervenors and the *Ad Litems* have performed their tasks in the best tradition of this old and honored profession.

OPINION ON SUGGESTION FOR PANEL REHEARING
[1996 U.S. App. LEXIS 33548]

(United States Court of Appeals — Fifth Circuit)

(Filed December 3, 1996)

(In re: ASBESTOS LITIGATION; JAMES FLANAGAN, et al., VERSUS GERALD AHEARN, et al., Appellees — No. 95-40635)

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Texas. Original Opinion of July 26, 1996, reported at: 1996 U.S. App. LEXIS 18475.

COUNSEL:

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For ASSOCIATION OF TRIAL LAWYERS OF AMERICA, (95-40635), Amicus Curiæ: Jeffrey Robert White, Pamela A. Liapakis, Associated Trial Lawyers of America, Washington, DC.

For AMERICAN INSURANCE ASSOCIATION, (95-04635), Amicus Curiæ: Craig A. Berrington, David F. Snyder, James L. Kimble, American Insurance Association, Washington, DC.

For ASBESTOS VICTIMS OF AMERICA, (95-04635), Amicus Curiæ: Scott McCullen Baldwin, Baldwin & Baldwin, Marshall, TX.

For CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY, (95-40694), Appellees: Herbert Maurice Wachtell, Meyer G. Koplow, Wachtell, Lipton, Rosen & Katz, New York, NY; Billy Glynn Parker, Ireland, Carroll and Kelley, Tyler, TX; Donald T. Ramsey, David M. Rice, Rodney L. Eshelman, Carroll, Burdick & McDonough, San Francisco, CA.

For PACIFIC INDEMNITY, COMPANY, (95-40694), Paul J. Bschorr, Richard B. Sypher, c/o Dewey Ballantine, New York, NY; Billy Glynn Parker, (See above).

For DANIEL HERMAN RUDD, JR., on behalf of themselves and others similarly situated, BEVERLY WHITE, on behalf of themselves and others similarly situated, JOHN HANSEL, on behalf of themselves and others similarly situated, (95-40694), Appellees: James E. Coleman, Jr., Diane M. Sumoski, John Andrew Martin, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX.

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ROBERT L SHAW, (95-40694), Appellee, Pro se, Westmoreland, KS.

For PENN MUTUAL LIFE INSURANCE COMPANY, (95-40694), Appellee: J. Russell Stedman, Barger and Wolen, San Francisco, CA.

For FIBREBOARD CORPORATION, (95-40694), Appellee: Kelly C. Wooster, Stephen M. Snyder, San Francisco, CA; William R. Irwin, James L. Miller, Brobeck, Phleger & Harrison, San Francisco, CA.

For ESTABAN YANEZ ORTIZ, EDEE COCHRAN, LESTER EUGENE TAYLOR, JOHN R. ALLGOOD, HENRY WILLIAM EVERS, (95-40694), Amicus Curiæ: Frederick M. Baron, Dallas, TX; Sidney Katherine Powell, S. Ann Saucer, Powell & Associates, Dallas, TX.

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For ASSOCIATION OF TRIAL LAWYERS OF AMERICA, (95-40694), Amicus Curiæ: Jeffrey Robert White, Associated Trial Lawyers of America, Washington, DC.

For AMERICAN INSURANCE ASSOCIATION, (95-40694), Amicus Curiae: James L. Kimble, American Insurance Association, Washington, DC.

For ASBESTOS VICTIMS OF AMERICA, (95-40694), Amicus Curiae: Scott McCullen Baldwin, Baldwin & Baldwin, Marshall, TX.

Before REAVLEY, DAVIS and SMITH, Circuit Judges.*

PER CURIAM:

The application for panel rehearing is DENIED.

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

TRANSCRIPT OF SETTLEMENT HEARING BEFORE THE HONORABLE ROBERT M. PARKER, CHIEF JUDGE FOR THE EASTERN DISTRICT OF TEXAS

(United States District Court —
Eastern District of Texas — Tyler Division)

(Proceedings of August 27, 1993)

(FIBREBOARD CORPORATION vs. CONTINENTAL CASUALTY COMPANY — Docket No.: 6:93cvll)

APPEARANCES:

For the Plaintiffs: Mr. Joe Rice, Mr. Joe Cox, Mr. Elihu Inselbuch, Mr. Harry Wartnick, Mr. James Scottile.

For Continental Casualty: Mr. Herbert Wachtell, Mr. Rod Eshelman, Mr. Leonard Rosen, Mr. David Gruenstein, Mr. Bill Parker, Mr. Meyer Koplow, Ms. Sarah Shields.

For Pacific Indemnity: Mr. Paul Eschorr, Mr. Richard Reinthaler, Mr. John Minton.

For Fiberboard: Mr. Steve Snyder, Mr. Bill Levin, Mr. Michael Spolan, Mr. Michael Douglas, Mr. William Irwin, Mr. Kelly Wooster.

* * *

August 27, 1993
4:30 p.m.

THE COURT: Be seated. Do you have an announcement now, gentlemen?

MR. RICE: Your Honor, Joe Rice on behalf of the court-appointed negotiating committee. Your Honor, we have been working basically around the clock with CNA and Fiberboard Corporation and lately with Pacific Indemnity trying to come to essential terms on a proposed settlement agreement that we would subsequently get in form and present to the court.

I think the intent today is to try to announce to the Court the significant terms of an agreement that we believe will be reduced to writing in a short period of time at which time we would present it formally to the Court. I think maybe the easiest way to do that, if the Court is — it is agreeable to the Court is just I will try to go through the essential terms and then when I finish if I leave something out, I'm sure there is enough people her to supplement it as we go forward.

As the Court had requested, we are dealing with a futuras action only. Let me get to the microphone so I can get on the record. The agreement is that Pacific Indemnity and CNA, on behalf of Fiberboard would pay into a settlement vehicle trust that would be created, the cash equivalent of $1,525,000,000 plus interest at the 90-day T-bill rate as of today with that deposit to be made no later than January 1, 1994 in a lump sum payment at that time.

They have the option of paying it earlier if they wish, but that if the latest date they can make the deposit into an agreed-to account. The interest drawn on the money thereafter would belong to the trust or the — upon final approval.

In addition, there are a group of unsettled present cases that will be identified, and there is a budgeted amount that will be finalized. It is not quite yet finalized. To the extent that budgeted amount is not needed to resolve that group of unsettled present cases, 80 percent of the amount remaining would then be transferred free and clear to the trust. The trust would then be responsible for complete defense litigation handling of the future cases that would have legal claims for personal injury, asbestos-related injuries as to Fiberboard.

There are two groups of cases that collectively refer to one group as green card cases. In presenting the final definition to the Court, the green card cases will be defined in such a fashion to be considered future cases, green card cases that took a dismissal without prejudice against the Fiberboard Corporation on a previ-

ously filed suit and has the right to come back upon subsequent development of a non-malignant disease process of certain severity or a malignancy. Those would be cases the trust would be responsible for.

As to cases that have previously filed claims against Fiberboard but who received a cancer waiver only, either by settlement with cash payment or by some other negotiated value but their only right is to return for a malignancy claim, those claims would be considered present and would remain the responsibility under any agreement of the settlement trust.

In addition, the Fiberboard Corporation will make a payment of $10 million dollars at present cash equivalent, and that will be used by the trust to fund subsequent annuity-type payment that we would present on future detail to the Court later, but additional payment in addition to the amount paid by CNA and Fiberboard — excuse me, and Pacific Indemnity.

In addition, this will be presented to the Court as a 23(b)(1)(b) class action. This agreement will not be final until the Court has had the opportunity to review it in all of its essential terms to determine the fairness of it, to make a finding on the reasonableness of it, to review it in detail, and take whatever testimony and whatever examination the Court deems appropriate. We want to make it clear at this time this deal is completely contingent upon Court approval and the Court's complete investigation of the deal on all issues that the Court deems appropriate.

In addition to the terms I have set forth, the Fiberboard Corporation will be responsible for the intake administration for a period not to exceed five years. The administrative part would be basically the suits would be filed against Fiberboard Corporation. They would do the intake, put it into the computer system, and then turn to the trust the responsibility negotiation, liquidation, or handling the cases after the global was approved.

Fiberboard, upon approval of the global corporation, will waive any attorney/client privilege, will waive any confidentiality, will waive any trade secrets, and all other essential information necessary to put the trust in the position to fully stand in the place of Fiberboard in the underlying tort litigation for subsequent claimants or members of the class that may claim injury, so that the trust would be in a position to fully understand, evaluate, and defend those actions.

Fiberboard Corporation will assign to the trust any and all claims for contribution and indemnity they have against other joint tort-feasors arising out of asbestos personal injury cases.

To the extent that this settlement or any other actions of behalf of Fiberboard Corporation or the insureds created the availability of additional insurance funds available to the Fiberboard Corporation from companies other than CNA and Pacific Indemnity, those funds will be used solely for the purpose of which they are intended, that is, for the defense and indemnity payments. Generally there will be a written agreement that further elaborates on this, and to the extent that those funds are remaining at the time that they are no longer needed by Fiberboard, any remaining funds will become property of the trust.

There is a provision under the April 9th agreement between CNA and Fiberboard that deals with a $95 million contingent payment by CNA; and that payment, to the extent not otherwise wrapped into these payments, would become property of the trust. We understand that when everything is said and done between Pacific and CNA and Fiberboard during the interim of the operation of the global while we are proceeding through this Court and is necessary through the appellate process, there may not be any of that fund left; but to the extent that it is, it is our position it becomes the property of the trust if it is not already part of the value received.

Your Honor, the agreement when finally presented to the Court would require the carriers of CNA and Pacific

Indemnity to fund all costs of the operation or this proceeding itself through to final resolution and the payment of class counsel attorney's fees as approved by the Court will be the additional obligation of CNA and Pacific Indemnity not to be credited against any previous monies paid or specifically not to be part of the $1,525,000,000 paid into the trust. It would be additional funds once approved by the Court.

THE COURT: The definition of future cases, the definition provided to me earlier representing, as I understand it, the agreement of the parties, is as follows: "The settlement class generally consists of all persons, who have now or may have in the future, asbestos-related injury or death claims against Fiberboard or related companies or person except those who settle those claims or file lawsuits on those claims before August 27, 1993."

MR. RICE: Your Honor, that would be amended when we finalize it about what I said about the green cards and the cancer waivers and also it will be amended to clarify what it meant by related companies or persons. It is the Fiberboard Corporation and those that bear legal responsibility for their asbestos liability, and we will clarify that.

THE COURT: Mr. Wachtell, you rise.

MR. WACHTELL: I just want to be sure that — I think Your Honor, inadvertently omitted the word "personal" when you were reading from the sheet of paper before "injury". I think it is personal injury or death claims.

THE COURT: Did I not say personal? I had intended to.

MR. WACHTELL: I think it was a slip of tongue, Your Honor.

THE COURT: You are correct.

MR. WACHTELL: I just want to be sure that there is nothing about the related companies or persons that expands what we understand we are talking about here, but I don't think we will have any difficulty with that. I have several additions just for clarification and specification to what Mr. Rice has proffered, Your Honor.

MR. RICE: I wasn't finished, but you —

MR. WACHTELL: Oh, I'm sorry, Joe.

MR. RICE: That's all right.

MR. WACHTELL: No, go ahead.

THE COURT: I thought you were through. Go ahead.

MR. RICE: Your Honor, in addition that before this global settlement was to be presented, we understand there will be presented to the Court for approval a bilateral agreement between the insureds and Fiberboard Corporation such that the integrity of this settlement will be preserved against any ruling that may come, be it adverse to one party or the other out of the California insurance litigation. So this settlement will resolve as it relates to this fund being created, the insurance litigation. That in litigation for other reasons may have to go forward one insurer, one carrier, one other manufacturer, we don't know. But the full intent of the parties, as we understand it, is that this settlement will live beyond the outcome of the coverage litigation no matter how that litigation is resolved. And that has to be subject to Court approval, as we understand it, the bilateral as well as the global.

I think those are the essential terms —

THE COURT: You are not talking about California court approval, you are talking about this Court's approval.

MR. RICE: No, Your Honor's Court Approval.

Your Honor, I believe those are the essential terms. I hope I have not left any out; and if I misstate them, I'm sure someone is going to clarify me.

THE COURT: Mr. Wachtell.

MR. WACHTELL: I think I am in accord with most of what Mr. Rice has said and where I am not, I will try to specify. I think he is accurately referring to an agreement in principal for a global settlement of all future personal injury asbestos-related claims against Fiberboard. As he indicated, this includes resolution of the coverage dispute as to these and —

THE COURT: Coverage dispute between CNA, Fiberboard, and Pacific.

MR. WACHTELL: That is correct, Your Honor. And as Your Honor has previously been advised, there is an agreement between Continental and Pacific with respect to the sharing of the settlement, global settlement that we are talking about, subject to Court's approval.

THE COURT: As I understood our previous conversations and the extensive negotiations, this agreement is subject to board approval.

MR. WACHTELL: This global agreement is likewise subject to board approval, Your Honor. Now, to specify things that I think have been mentioned and are understood —

THE COURT: No. You and I did not communicate. This agreement, as I understood it, is subject to board approval on the Fiberboard — I'm sorry on the CNA/Pacific agreement. If CNA and Pacific do not have board approval for that agreement earlier announced, then that is — nullifies the global agreement.

MR. WACHTELL: That is correct. It is a condition to the —

THE COURT: Plus the global agreement is subject to board approval.

MR. WACHTELL: That is correct, as well, Your Honor.

Okay. With respect to the amounts that have been specified to be payable on this global settlement of the future claims, the obligations of Continental and Pacific are several. In other words, each will pay the amount agreed upon between them pursuant to that contract between them, and the aggregate of those amounts will be the amounts that have been agreed upon with Fiberboard and the claimants as recited.

With respect to the escrow fund that is to be created, as correctly indicated, not later than January 1 of 1994, Your Honor, the investments that fund will be subject to joint agreement; and if there is a failure of such agreements, the default provision is that the money will be invested in treasuries of two years or less maturity.

Well, the escrow then — the concept is the escrow is obviously subject to joint control and will follow the question of final approval of the global. If there is final approval of the global settlement, the original principal amount plus accrual — accrued earnings thereon will flow into the settlement trust. Upon failure of such final approval, the fund principal together with earnings will revert to Pacific and Continental in the pro rata shares.

THE COURT: Now, that's not my understanding of the negotiations. It was my understanding that it would revert pursuant to the terms of the bilateral agreement.

MR. WACHTELL: I was going to come to that, Your Honor. If there is a bilateral and that is finally approved then — I was going to refer to that.

THE COURT: Now. Mr. Wachtell, the confusion I have and I might not have understood Mr. Rice, does the interest obligation begin on — at the time of funding which is no later than January 1, '94, or does begin at an earlier date?

MR. WACHTELL: No, unfortunately I think he said it began today.

THE COURT: Well, I didn't hear.

MR. WACHTELL: I'm sorry, Your Honor. I'm sorry to have to say that we had to agree that it begins today.

THE COURT: All right.

MR. WACHTELL: Your Honor, the — as has been indicated, this is — the agreement is for a mandatory non-opt-out clause pursuant to Rule 23(b)(1)(b) of the Federal Rules of Civil Procedure, and I think it is the parties' intent to very shortly be presenting paper appropriate to Your Honor for your consideration of certification, for settlement purposes only of a preliminary certification of such class for settlement purposes.

In return for the monies that Continental and Pacific will be agreeing to pay pursuant to this global settlement, Continental and Pacific and Fiberboard are to be receiving total peace, what I term total peace. This is an all-end settlement with respect to future claims as they have been defined for Your Honor, and that

includes without limitation protection against and bars against any cross claims of any description whether by way of contribution or indemnity, any direct action claims that may exist under the laws of any jurisdiction, any claims by Fiberboard for indemnity defense or anything else under the sun. In other words, these amounts are buying the insurers and Fiberboard total peace with respect to any claims, direct or indirect, involving these future claimants as defined. I think that —

THE COURT: The only element that I recall that I think has not been mentioned, in the unlikely event of failure to achieve Court approval and failure to achieve approval of the — well, or as part of the bilateral agreement, the relation of the funds to Fiberboard's benefit would include the interest.

MR. WACHTELL: Your Honor, I'm sorry. I keep on saying I am going to be referring to that. I guess I am trying to go down on my notes, but if you want me to talk — because I have a number of items on the bilateral —

THE COURT: I thought you were winding down.

MR. WACHTELL: Oh, no. I am just trying to decipher my own handwriting, Your Honor.

THE COURT: I should have know better. Go ahead.

MR. WACHTELL: I think there was reference to — and quite correctly by Mr. Rice to the fact that Continental and Pacific have agreed to pay the reasonable fees of the Plaintiff's negotiating committee as fixed by the Court, and that should be separate and apart from the amount agreed to be paid to futures class. I think should not [*sic*] without meaning to indicate to Your Honor what, you know, is or is not an appropriate fee for Your Honor what, you know, is or is not an appropriate fee for Your Honor to determine upon, that our agreement is — our obligation to pay that amount at least is not to exceed three percent of the overall sum going into the futures class, which I think we have agreed would be the 1.525 billion plus any additional amounts pursuant to the arrangement that Mr. Rice described.

It is intended that the trust and the agreements will have pay-out provisions from the trust designed to provide pay-outs over a 45-year period and that those will be reasonably satisfactory to the insurers and to Fiberboard. It is the intention of the parties, and the parties are agreeing —

THE COURT: Well, let me interrupt you again. It is my understanding that given the agreement negotiated for the additional contribution represented by the $10 million contribution by Fiberboard, that there is an additional 20 years that the trust — so it is a 60-year operation.

MR. WACHTELL: Yes, I think that is accurate, Your Honor. My 45-year reference is to the pay-out and distribution provisions with resect to the funds agreed to be provided by Continental and Pacific.

The parties have agreed to cooperate forthwith to request of the California Court of Appeals before which the appeal in the coverage cases is pending, to refrain from rendering a decision as to those issues that are unique to either Continental or Pacific on the one hand and Fiberboard on the other in that appeal.

It is also intended to be a term of the definitive agreement that upon execution of that agreement, the parties will seek a stipulated reversal in the California coverage cases of the judgement of the superior court, insofar as that judgment was adverse to Continental and Pacific. Fiberboard acquiesces in Continental's having negotiated for an entering into a futures only global settlement, as well as agrees to Continental entering into specific global settlement that is being outlined for Your Honor today and acknowledges that this in entirely consistent with the April 9, 1993 agreement that exists between Continental and Fiberboard.

I do turn to the bilateral agreement, Your Honor, as that would be an agreement between Continental and Pacific on the one hand and Fiberboard on the other to settle any and all claims against Continental or Pacific or their respective policies with Fiberboard, and that

would include direct claimants, cross-claims, claims by Fiberboard, the totality of claims that could be raised under the policy. Such a bilateral would be subject to final Court approval.

And there is, as Your Honor had indicated, a correlation between the — that agreement, as I think Mr. Rice has indicated, is essentially intended to exist as a stand-by agreement in what we all think is the unlikely — well, I should not presume. In the event — I don't want to presume anything. In the event that the global agreement should fail final Court approval for any reason, and my partner Mr. Rose has the language that I think has been discussed between the parties as to the precise correlation of the consideration. Leonard.

MR. ROSEN: This is the — one of the terms what was discussed at some length today was the question of what the cost of the bilateral might be, and the following language I think is satisfactory to both Fiberboard and Continental in terms of what the price term of the bilateral might be: The first element of it is that the — it has to be recognized that the costs for the present settled cases and the unsettled cases are and will remain an unknown. Fiberboard will deal with the negotiations for a bilateral to achieve a reasonable approximation of the anticipated cost to Continental of disposing of those cases under the terms of the April 9th agreement. That is one element, the present settled and the present unsettled.

The second element of price would be with respect to the future class, and there we agree the price, the bilateral price for that element of the bilateral agreement will be calculated and have two parts to it. The first part would be an amount equal to the amount which Continental and Pacific have agreed to pay to the Plaintiffs in a global, including in that amount or plus whatever interest may be earned or actually accrued on that amount since interest is going to comment accruing today, and it is the net amount of that interest. If there are any taxes, that would come off. But the entire

amount plus the net interest would be devoted to the bilateral.

And in addition, the costs of the contemplated fees and expenses of the global that are saved by not doing the global, by which we would mean the costs and expenses referred to of Plaintiffs' Counsel, the notice costs that we are agreeing to; and, in addition, there is an obligation under the April 9 agreement to pay the counsel fees of Brobeck in connection with the global. To the extent any of those costs are saved, that could be relevant price term with respect to the bilateral so that the bilateral would be equal in cost roughly to what the global would have cost.

Lastly, I would mention only as to the April 9 agreement. It is contemplated that the agreement will require some modification, and that it will basically continue in effect with respect to the administration of claims. During the interim period while the global and the bilateral are going through the Court process, and will remain substantially in effect to the extent not inconsistent with the understandings that we have talked about with respect to the global and bilateral, and that will be working out as we negotiate the details of the bilateral, which we will be doing in the next — the near term, the next few days or weeks, Your Honor.

MR. WACHTELL: I think what Mr. Rosen has just said covers my note that — let me just ask him because I don't want to say anything inconsistent from what he was just saying.

(Conference off the record.)

MR. WACHTELL: With respect to certain other provisions of prior agreement between the parties, Your Honor, assuming final approval of a global or bilateral agreement, there is — there are various provisions in the March 27, 1992 agreement between Fibreboard and Pacific with respect on certain contingencies to payments of amounts up to I believe $330 million to be paid by Pacific and Fibreboard. And assuming final

approval of the global and bilateral agreement, it is understood and agreed that those obligations are deemed fully satisfied by the amounts that Pacific is agreeing to pay as its share of the global or bilateral.

Likewise, the same is true as to certain provisions of the April 9, 1993 agreement between Continental and Fibreboard where Continental essentially agreed to back up the payments of Pacific under that prior March 27, 1992 agreement. Those, likewise, will be deemed fully satisfied.

There was a couple of items that Mr. Rice mentioned, which we have not previously been cognizant of, some of which I just want to reserve on because I'm not sure I understand the implications, but I am sure we will work them out in negotiating the definitive agreement. For example, there was a mention — and I'm not meaning to be all inclusive here — of Fibreboard assigning to a trust — to the settlement trust, claims over against others. I'm not sure I have an objection to that. I have just simply not thought through —

THE COURT: The indemnity or contribution claims?

MR. WACHTELL: Excuse me?

THE COURT: The indemnity or contribution claims.

MR. WACHTELL: Yeah, I think if we are getting a full bar order against other people, I may well have no problem with that whatsoever. I simply have not thought through the potential implications and would like — don't want to be deemed to have acquiesced without having done so.

There is one thing that Mr. Rice said that, however, I think I understood enough to say I was not in agreement with it and I think was not understood, I think it is probably going to be an academic issue, and that is that if any money was not expended of the 95 million that is referred to in the April 9, 1993 agreement Continental and Fibreboard, I think Mr. Rice said that any such remainder would flow into the settlement trust.

That I think is not accurate. I think under the terms of the April 9th, 1993 agreement any such money is not

expended of the property of Continental; but again I think there is a good likelihood all that money will indeed be expended, so it is probably an academic point.

Your Honor, I do not think I have anything else on the terms of the understanding of the parties.

THE COURT: Mr. Bschorr.

MR. BSCHORR: Thank you, Your Honor. Just a couple of clarifications to make sure that we have it. We have already discussed these agreements both the Pacific/Continental agreement and the futures agreements to be ultimately written up subject to board approval. We expect to get that board approval promptly.

With respect to the Fibreboard/Pacific Indemnity agreement that has already been referred to by Mr. Wachtell, the basis understanding there is that any monies that we would otherwise be obligated to pay under that agreement, are fully satisfied here or they are paid here, result in a credit so there is nothing more that we are to pay.

One clarification on the California case. As Mr. Wachtell indicated, we are going to file very promptly a letter followed by whatever else is necessary to seek to have the California court first be apprised of what happened here and secondly seek with their indulgence that they not issue an opinion with respect to the discrete issues between Fibreboard — or among Fibreboard, Pacific Indemnity and Continental.

As part of the global futures settlement, there will be, as Mr. Wachtell said, a stipulated reversal request placed to the California court. If that request is granted, it will further — the global will provide that if by chance the global settlement before this Court as it winds its way to the courts approval and the bilateral, which is affixed or annexed to it, both fail of ultimate court approval, final court approval; that at that point, the appeals in California as to those discrete issues will be reinstated before that court for decision by that

court, so that at the end of the day we expect if the global goes forward, if the global doesn't, the bilateral goes forward but only if both fail of ultimate court approval, do we go back to that fall back position.

THE COURT: Well, I had understood contrary to that during the negotiation this afternoon, that if the global fails, if the bilateral fails, the funds would be available to Fibreboard and would not revert back to the parties, including —

MR. BSCHORR: No, I don't understand that at all, Your Honor.

MR. WACHTELL: No, Your Honor, if the global fails, then assuming final approval of the bilateral, then under the fundamental price provisions that Mr. Rosen outlined, the monies that otherwise would have been devoted to the global will be available to the bilateral; but if the bilateral also fails final approval — and let me say because I think I omitted to say, that what is meant by final approval there is a judgment of the Court, final judgment of the Court essentially adjudication and cutting of any claims of any parties, direct, cross-claim, or whatsoever against the insurers or the policies, if that fails final approval, well then all bets are off and the money reverts to the respective insurance companies.

THE COURT: Well, I invite counsel perhaps to have additional conversation. My understanding was that the goal sought to be achieve by Continental and Pacific was to place forever, and with Fibreboard's agreement and with the Plaintiff's agreement, you had negotiated a limit of future liability whether it is by contribution to the trust or by indemnity payments if the trust and the bilateral fail with Fibreboard receiving the benefit or the accrued interest.

MR. WACHTELL: No, I don't believe —

THE COURT: Am I incorrect?

MR. WACHTELL: I think you are incorrect, Your Honor. It has always been the position of Continental and since Pacific has come to the table, so to speak, that given the magnitude of the dollars that we are talking about

and the areas of the law that are not entirely free from doubt with respect to the power of the parties to enter into a bilateral agreement without participation, for example, of each and every claimant or cross-claimant, that the only way that the insurance companies would be prepared to make such monies available to Fibreboard would be if there was indeed a final court judgement and proceeding to which all potential claimants have been made parties directly or in a representative capacity adjudicating that the agreement was valid, fair, and did cut off all of the rights.

THE COURT: I understand.

MR. WACHTELL: So that has always been an element of the understanding.

MR. BSCHORR: That certainly is my understanding.

MR. RICE: Your Honor, it is our understanding, in simple language I think, if you are going to do a bilateral agreement, if the Court finds that a fair and reasonable agreement, then the global will go forward. If the global goes forward and the Court finds it fair and reasonable and we get final decision, if the global is for some reason not approved, the bilateral stands; if the bilateral is not approved, they are back in California court.

THE COURT: I understand.

MR. BSCHORR: And just the final point, Your Honor, is with respect to the Fibreboard/Pacific agreement of March 1992, there will be a term in this global, that any of those terms in that agreement that are not inconsistent with what we are doing here will be reaffirmed and made part of this agreement so that we have everything presented to the Court for approval and to go out for the full notice. Thank you.

THE COURT: Mr. Snyder.

MR. SNYDER: Your Honor, I am going to limit myself to picking up points where I think some addition or clarification is needed so I am not restating generally any of the terms of the agreement here.

With regard to the interim administration obligation of Fibreboard for a period not to exceed five years, I believe that we should clarify that our agreement is that that is an unconditional obligation for the period that the approval process of this global agreement is in the court. We, that is Fibreboard, will use its best efforts to get the support of its insurers to continue that through the end of the five-year period.

With regard to the waiver of confidences and privileges in order to invest the trust with the information necessary to defend the claims, we expect and there is an agreement, that the trust will be required to keep those confidences and that we will structure the transfer of that information in a way to protect them within the ambit of the attorney/client and work-product privileges to the extent that we can.

With regard to the cross-complaints for contribution and indemnity, those claims and Fibreboard's assignment to the trust, I believe that Mr. Wachtell — Mr. Wachtell arose on this point I believe our agreement is that Fibreboard transfers all of its right and title to those claims. If some right of subrogation under an insurance policy or otherwise an insurance company is the true owner equitably or legally of that claim, then it would be subject to that right.

I simply wish to add to Continental and Pacific, the point on behalf of Fibreboard that Fibreboard also must have board approval, and it will be seeking board approval for entering into this agreement.

Mr. Rosen correctly made the point that the April 9th agreement between Fibreboard and Continental continues in effect with regard to interim claims administration. I would also like to point out that our arrangement is that that agreement is unaffected and continues in effect with regard to the unfinished business of disposing of the settled and unsettled present claims. It is not part of this global agreement, but it is something that survives in the April 9th agreement.

Moreover, the bilateral agreement, the price term on which Mr. Rosen described, that price term is the price term that we have agreed upon in the absence of a global agreement, going back — in the absence of a global approval. Going back to a circumstance that we just discussed. In the event that the global for any reason is not approved, the fall back is the bilateral. The price term under those circumstances is as Mr. Rosen has described it. What that bilateral says about the responsibilities of the parties in the event that the global is approved, is something that is yet to be negotiated as part of that bilateral agreement.

Those are all my remarks, Your Honor.

THE COURT: Anything further from the Plaintiffs?

MR. RICE: A couple of minor points, Your Honor. No. I, we understand that Pacific and Continental cannot today disclose the terms of their agreement, subject to board approval. We understand upon their receiving board approval, which should be in the next few days, that we will be given disclosure in writing as to the terms of that agreement, at which time then we understand that the payments will come one from the — one payment from Pacific and one from CNA, but it is our position that both of those payments must be made before this deal goes forward. This deal is contingent upon both payments being fully made.

In addition, I want to make clear that the escrow funds and the interest or earning on those escrow funds would be used for the benefit of the trust upon approval of the global, and none of those funds would be available to provide for the cost or fees in this case or in the proceedings that we are — will go forward with.

We understand also that a request is being made to the California court to deal with the appeal. There is nothing conditional about what happens in California as far as this deal is concerned. We want to make sure that is clear. And the request from California court to enter

a stipulated reversal is not a condition of the global deal in any way, shape or form.

MR. BSCHORR: The granting of it by the California court. It will be a condition that the application be made.

MR. RICE: Mr. Snyder and I seem to have a little bit of difference on the administrative — the five years versus the period of time. We won't burden the Court now. We will try to work that out, and if not we will be back with the Court on that.

THE COURT: Mr. Wachtell.

MR. WACHTELL: Let me burden the Court on that. I guess I should have arisen to this a moment ago, but I overlooked it in my notes. When we indicated that separate and apart from the monies, that we are agreeing to pay a settlement into the trust that we had independently committed, as I indicated, and the costs of notice and dissemination of notice. We are not agreeing and have not agreed to pay the cost of administration of the trust, and that included in matters that we have not agreed and have not been consulted upon any period of five-year interim administration by Fibreboard let alone any period beyond that. That is not something we are agreeing to.

One other comment by Mr. Snyder, which I am not quite sure I understood, so let me just issue a caveat. He said he was in agreement with Mr. Rosen's description of the price term on a bilateral as a bilateral stood to — as I understood him to say — as a back up to a global, but then he said something about that this was not necessarily the case other that the bilateral being a back up to the global. Without seeking to understand what he was saying, I just want it to be clear that there should be no implication that in any circumstance is the consideration going to be greater than would have been payable — or payments due from us to be greater that what would have been due under the global.

One second, Your Honor.

(Conference off the record.)

MR. WACHTELL: I'm sorry. When we said counsel fees of the class counsel, in my parlance that was meant to include reasonable expenses of class counsel in connection with doing of the deal as well. I did not mean to omit that, Your Honor.

THE COURT: Mr. Wachtell, did you secure the identity of the presiding judge on the California panel.

MR. WACHTELL: Yes, Mr. Eshelman has that, Your Honor.

THE COURT: I will be available to meet with counsel in chambers if you want the Court to advise that court of these proceedings.

MR. ESHELMAN: That will be helpful, Your Honor. It is William A. Newsome, and I have his phone number and address.

THE COURT: Mr. Snyder, you have another matter?

MR. SNYDER: Two minor points, Your Honor, and that will be it. I want to make sure that the record is clear that Mr. Wachtell and the people at Continental have not been consulted with regard to these interim claims administration costs. That's something we need to discuss, but I am not represent [*sic*] that they have agreed to any of this.

Mr. Bschorr — I believe something about the Pacific Indemnity agreement with Fibreboard being satisfied by these payments, and I think that is true only in the event that the final global or the final bilateral occur. If we fall back on our — on the state of no agreement, the state of nature we have now where we have to go back to the coverage case, than either that agreement is reinstate or we have to work out what happens to it because that is not clear.

MR. BSCHORR: That agreement is reinstated.

MR. SNYDER: My remarks with regard to the price term on the bilateral were only intended to emphasize that we had agreed to, Mr. Rosen and I, about the price that is in effect for the future cases component of the Fibreboard liability in the event that the global is not approved, that is, if we have to fall back on the bilateral

terms. Mr. Rosen and I have no agreement on exactly how the bilateral agreement will work if the global is completely finalized.

THE COURT: Thank you, gentlemen. I will meet counsel in chambers if you wish me to have communication with the California court.

MR. WACHTELL: Your Honor, may I just, before you leave the bench, express on behalf of the parties I represent, I think probably on behalf of all parties, a very great appreciation to Your Honor for the effort that went into permitting us to come in to announce this understanding today. I think this is a very, very major transaction. I think it is a major step in solving and giving an example of how a problem that has plagued the courts in nations here can be solved, but I think Your Honor provided spark for this, the guidance, and got us all together and made us stay with it until this deal could be done, and I want to express my thanks.

THE COURT: Thank you, gentlemen.

MR. SNYDER: Your Honor, for the first time in the proceeding I agree with everything Mr. Wachtell says.

(End of hearing.)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE ROBERT M. PARKER,
UNITED STATES DISTRICT JUDGE, PRESIDING

(United States District Court —
Eastern District of Texas — Tyler Division)

(Proceedings of September 9, 1993)

(GERALD AHEARN, JAMES DENNIS and CHARLES W. JEEP, On behalf of Themselves and Others Similarly Situated, Plaintiffs, v. FIBREBOARD CORPORATION, Defendant; CONTINENTAL CASUALTY COMPANY and PACIFIC INDEMNITY COMPANY, Intervenors —Civil Action No. 6:93cv)

APPEARANCES:

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For the Defendant: Brobeck, Phleger & Harrison, by KELLY C. WOOSTER, One Market Plaza, Spear Street Tower, San Francisco, CA 94105.

For Intervenor, Continental Casualty Company: Wachtell, Lipton, Rosen & Katz, by HERBERT M. WACHTELL, MEYER KOPLOW, LEONARD ROSEN, JEFFREY R. BOFFA, 299 Park Avenue, New York, NY 10171; Ireland, Carroll & Kelley, P.C., by BILL PARKER, 6101 S. Broadway, Suite 500, Tyler, TX 75703; Carroll, Burdick & McDonough, by RODNEY L. ESHELMAN, DONALD T. RAMSEY, 44 Montgomery Street, Suite 400, San Francisco, CA 94104.

For Intervenor, Pacific Indemnity Company: White & Case. by RICHARD B. SYPHER, 1155 Avenue of the Americas, New York, NY 10036.

* * *

September 9, 1993
6:00 p.m.

THE COURT: Good afternoon, counsel.

MR. INSELBUCH: Elihu Inselbuch from Caplin & Drysdale. We would like, Your Honor, at this time to file with the Court a class action complaint, United States District Court, Eastern District of Texas, Tyler Division, *Gerald Ahearn, James Dennis and Charles W. Jeep, Plaintiffs, On Behalf of Themselves and Others Similarly Situated* v. *Fibreboard Corporation*. May we hand that up, Your Honor?

THE COURT: Yes, sir.

MR. INSELBUCH: I'm also authorized to advise the Court that the Defendant, Fibreboard Corporation, has stipulated to the service of the summons and the complaint.

THE COURT: The Court will not assign a number until sometime tomorrow since my number-assigning person is not present.

MR. INSELBUCH: Very well, Your Honor.

THE COURT: The Court accepts it for filing and will mark it filed at 6:05 p.m., Central Daylight Time. I should also state for the record that I conferred this afternoon with Robert Sweeney, attorney from Cleveland, that the Court had earlier designated as part of the Plaintiffs' negotiating team. Mr. Sweeney advised the Court that because of potential conflict that he wished to withdraw as part of the team. The court accepted his oral request to withdraw and granted it.

MR. INSELBUCH: Very well, Your Honor. May I now ask Mr. Wachtell to present an additional motion?

MR. WACHTELL: If it please the Court, Herbert M. Wachtell, counsel for Continental Casualty Company, and I believe I am also speaking on behalf of Richard Sypher, counsel for Pacific Indemnity Company, and if I say anything he doesn't agree with I'm sure he will let me know about it.

We wish to present to the Court, Your Honor, a motion on behalf of Continental and Pacific to intervene in the action that has been filed, both as of right and in the Court's discretion, and we have prepared a memorandum of law and we also wish to file a proposed joint intervention pleading.

I'm glad we took great care to get all the papers lined up so we could do this simply, Your Honor. We will have it in a minute.

Your Honor, although I'm quite sure that somewhere I approved a memorandum of law in support of the motion, physically it does not appear to be here. I do have the motion itself. I have the proposed pleading and I think it is —

THE COURT: Go ahead and file your motion, counsel, and I will accept and review your memorandum when filed.

MR. WACHTELL: The grounds of the motion, Your Honor, are that given the fact that both Continental and Pacific are claimed by Fibreboard to be insurers of the obligations that are set forth in the original complaint and given the agreement in principle that has been reached, which they are making the major contribution, they obviously have an interest here to be protected in these proceedings and it is appropriate that they be permitted to intervene under rule 24, Your Honor.

THE COURT: The Court signed the order granting the motion for leave to intervene.

MR. WACHTELL: Thank you very much, Your Honor.

THE COURT: I don't know that it's absolutely necessary. Do you wish to address the proposal regarding certification, provisional certification and/or the TRO?

MR. WACHTELL: Yes, I do, Your Honor. First, Mr. Inselbuch, on behalf of Plaintiffs, says it's perfectly fine for me to lead off on the motion for class certification because — and I want to emphasize this — it is a joint motion. It is a motion in which the corporate parties and the insurers, Continental and Pacific, are joining and the motion asks for certification provisionally, for

settlement purposes only, of a 23(b)(1)(B) class of future claims as defined in the complaint.

THE COURT: I have the proposed order, counsel.

MR. WACHTELL: Your Honor, I have and I would like to file the joint motion for provisional class certification itself, the affidavits and exhibits upon which it is based, to-wit:

(1) The affidavit of Meyer G. Koplow, and there are three fairly hefty, bound volumes of exhibits that are being presented to the Court along with that affidavit;

(2) The affidavit of Roger M. Trangsrud; and

(3) The affidavit of Joseph B. Cox, Jr., who is, of course, one of the class counsel who have been designated here.

We also have, Your Honor, a joint memorandum of law for the Court in support of provisional class certification.

THE COURT: The Court accepts the filings and will mark them as "filed."

MR. INSELBUCH: Elihu Inselbuch, once again. We, on behalf of Plaintiffs, join in the motion for provisional certification in accordance with the papers as drawn.

MR. WOOSTER: Kelly Wooster, Brobeck, Phleger & Harrison, representing Fibreboard. Fibreboard does not appear on the papers filed by the Plaintiffs and Continental and Pacific as one of the moving parties with respect to the motion for class certification. The reason for that is that in an agreement among Continental, Pacific and Fibreboard resolving certain disputes, among them was a condition to a global settlement, and that was the so-called "bilateral agreement."

As of early this morning, we had not reached agreement on all essential terms of that bilateral agreement. Today we did reach agreement on the essential terms of that bilateral agreement, and so Fibreboard joins in the motion for provisional class certification. We will also join in the motion for temporary restraining order and preliminary injunction when that is made. We don't necessarily agree with everything said in all of the papers

since they are not our papers, but we do join in the motions. Thank you.

THE COURT: Thank you, counsel.

MR. WACHTELL: If Your Honor please, because we have prepared extensive papers on the motion which set forth in detail the need and justification for it, I was not planning to address it orally unless the Court has some —

THE COURT: I see no reason for you to. You are not writing on a clean slate here. These matters have been the subject of extensive negotiations between counsel that the Court has participated in.

MR. WACHTELL: The next motion, then, Your Honor, that we wish to file with the court is a motion for a preliminary injunction.

THE COURT: The Court has entered the order provisionally certifying counsel.

MR. WACHTELL: The next motion, then, is a motion by the Intervenors, Continental and Pacific — and as Mr. Wooster just indicated it is a motion in which Fibreboard joins — for a preliminary injunction, and that motion is coupled with a request that Your Honor today enter a temporary restraining order to maintain the status quo.

The moving papers upon that motion, Your Honor, are: the affidavits of Meyer Koplow and Roger Trangsrud previously filed with the Court in support of the motion for class certification, which are doing double duty on this motion, as well, and the exhibits, of course; and an additional affidavit of Bill Parker in support of the Application for a temporary restraining order.

I have the Intervenors' motion for preliminary injunction and temporary restraining order, and I have the Intervenors' memorandum of law in support of the motion for preliminary injunction and for temporary restraining order I respectfully hand up.

THE COURT: Counsel, the Court is signing the proposed order and will set the hearing for 10:00 a.m., September 27, in Tyler, Texas. What is the time now? It is 6:15 p.m.

MR. WACHTELL: Your Honor, because of the large number of persons whom we are seeking to give notice to of the application for preliminary injunction, we have thought that is was desirable and have suggested to the Court — and the Court has now indicated that it is so doing — that the return on the motion be set more than 10 days out in order to give people a reasonable opportunity to be heard and oppose, if they are so minded, and also the order specifies that answering papers should be served I think it's five days up front of the return date so we all can know what we are dealing with.

As a result of that, however, because we are more than 10 days out and because the provisions of the federal rules speak of a temporary restraining order typically only being for 10 days, subject to extension thereafter, we are limiting our request at this time for a 10-day temporary restraining order, limiting our request that a temporary restraining order be simply for a 10-day period.

THE COURT: You are limiting your request to that which you are entitled to ask for.

MR. WACHTELL: That's correct, Your Honor.

THE COURT: The Court has gone ahead and set the hearing in anticipation of extending it because in the real world that's what will happen.

MR. WACHTELL: I want to make it clear that it's our intent to, at the appropriate time, ask for an extension to keep the status quo in place until the Court hears the preliminary injunction. Again, Your Honor, these are very extensive papers and we have set forth an extensive memorandum of law as to why we need the preliminary injunction ultimately and why we need the temporary restraining order right now, and I was not planning to address those issues again unless there's any question.

THE COURT: I see no reason for you to address them.

MR. WACHTELL: Your Honor, in the order to show cause or the order granting the temporary restraining

order and setting the preliminary injunction down for hearing, we have referred to a list of lawyers who have regularly represented asbestos claimants. It is a list to whom we contemplate giving notice as specified in the order, and I want to file that list with the Court.

THE COURT: Very well. Let me inquire of Bill Parker, is it your intention to return to Tyler this evening?

MR. PARKER: Yes, Sir.

THE COURT: You are hereby designated a deputy district clerk of the Eastern District of Texas, and I will entrust the original of the papers to you, if you will deliver them to Ms. Thompson, then, at 9:00 in the morning.

MR. PARKER: I will do so.

MR. INSELBUCH: If I could just add for the record, the service list of counsel is the service list that the Manville Personal Injury Settlement Trust uses, and it is my understanding that that list includes every lawyer who has filed a claim on behalf of a claimant before that Trust, and as far as we are all aware it is the most complete list that we could put together.

THE COURT: Thank you, counsel.

Gentlemen, let me mention one other thing. You are all aware of the fact that I think our country, more than any other that I am familiar with, with England running a close second, has depended on lawyers throughout its entire existence to solve its real problems. I think the work you have performed over the past few weeks, and specifically extremely difficult issues you dealt with the past few days, is in the highest tradition of the profession. I'm proud of you. I've been pleased to be associated with you.

I think you have all represented your respective clients extremely well. I think it is a significant thing you have done and I commend you. We will trust in the scholarship, the good judgment and common sense of the ladies and gentlemen on the courts of appeal in the event this comes to their attention. Anything else we need to be on the record with?

MR. WACHTELL: Your Honor, I would be remiss if I did not express, I think, the appreciation of all of us for the encouragement, counsel, advice and aid that Your Honor has given.

THE COURT: You made my job easy.

MR. WACHTELL: We have tried, but you have been an enormous help to us, Your Honor.

THE COURT: This Court is in recess.

28 UNITED STATES CODE § 455

§ 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, provides the grounds for the disqualification.

FEDERAL RULES OF CIVIL PROCEDURE 23

Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are no questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the finds include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the members from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will

include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative par-

ties or on intervenors; (4) requiring that the pleadings to be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court direct.

(As amended Feb. 28, 1996, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

No. 96-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
1997
CLERK

JAMES FLANAGAN and DAVID H. MIDDLETON,

Petitioners,

vs.

GERALD AHEARN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY, PACIFIC INDEMNITY COMPANY, PLAINTIFF CLASS AND FIBREBOARD CORPORATION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida, S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly owned subsidiaries of respondent Pacific Indemnity Company.

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STATEMENT OF THE CASE

This petition is one of two petitions seeking this Court's review of the Fifth Circuit's opinion approving the class action settlement in this case (known as the "Global Settlement"). Respondents Continental and Pacific have filed a brief in opposition to the other petition (*Ortiz v. Fibreboard Corporation*, No. 96-1394) extensively setting forth the factual background of this case. That brief also fully responds to the question the two petitions present in common with respect to the constitutionality of the certification of a non-opt-out class in the circumstances of this case. To avoid repetition, the Court is respectfully referred to that brief in opposition as to those matters, and respondents will confine this brief to the separate question presented only by these petitioners (the "Flanagan Petitioners"): that is, the contention that the Fifth Circuit abused its discretion in determining that the District Judge's recusal was not warranted on the facts of this case.

As detailed below, there is no cause for this Court's review of this factbound contention, which has now been rejected by the District Court (per an independent district judge to whom the recusal issue was referred) and by two separate panels of the Fifth Circuit. Substituting hyperbole about "ill wind[s] of gale force extinguishing . . . the Magna Carta" and the like (Pet. 3) for an accurate description of the underlying facts, the Flanagan Petitioners have grossly distorted the District Judge's exceedingly limited role in the Global Settlement negotiations and the procedural history of this case.

A. The petition misrepresents how this case came before the District Court.

In furtherance of their assertion that the Global Settlement was somehow a creation of the judiciary rather than of the

parties, the Flanagan Petitioners portray the District Judge as having injected himself into matters not properly before him in order to "craft[ ]" a settlement. Pet. 5-7. This portrayal is flatly contrary to the actual facts and the Fifth Circuit's determinations with respect to the origin of this case. App. 4a-15a.*

Summarized briefly, Fibreboard — a former asbestos manufacturer with over $3 billion in current settlement obligations and contingent liabilities to future asbestos claimants, but with non-insurance assets sufficient to pay only a small fraction of that amount — was locked in an extended coverage dispute in the California courts with two insurers, Continental and Pacific. App. 4a-6a, 39a, 243a, 343a. Fibreboard claimed that the insurers owed it no-aggregate-limit insurance coverage on policies issued in the 1950s; the insurers denied that coverage. App. 4a-5a. A Fibreboard loss in this litigation would render future asbestos claims against it, no matter how meritorious, virtually worthless. App. 41a-43a, 323a-324a.

Short of non-insurance funds, and wanting to press Continental into settling the coverage dispute, Fibreboard began a program of "assignment settlements," whereby asbestos claimants would receive an agreed-upon settlement amount, which the claimant would then collect from *Continental* if Fibreboard prevailed in its coverage litigation: in other words, Fibreboard would settle claims against it with "Continental dollars." App. 7a-8a. Asbestos claimants agreed to these terms — since, among other things, they wanted to encourage a settlement of the coverage dispute — but only on the conditions

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* Because the appendix submitted by the Flanagan Petitioners omits several important elements of the decisions below (including the District Court's findings of fact), citations to "App. __" refer to the more complete appendix submitted by the petitioners in *Ortiz v. Fibreboard Corp.*, No. 96-1394.

(1) that Fibreboard obtain court orders validating its right to make these assignments (which Continental strongly disputed); and (2) that the settlement amounts be substantially higher than the previous norm. App. 6a-8a.

In late 1992, Fibreboard entered into a single such assignment settlement of at least 20,000 claims, purporting to assign these claimants the collective right to hundreds of millions of dollars of Continental's money. App. 8a. On January 11, 1993, Fibreboard brought suit against Continental in the District Court seeking the court order insisted upon by the claimants validating Fibreboard's right to make such an assignment and also cutting off any contribution rights Continental might have against Pacific. App. 8a, 269a. In February 1993, Continental's parent, CNA Financial Corporation, announced that Continental had increased its asbestos-related reserve by $1.5 billion and would seek a global resolution of all its asbestos exposure on its Fibreboard policies. App. 9a, 270a. At a status conference several weeks later, Continental informed the District Judge that — while it was willing to seek a settlement — any settlement would have to resolve totally its asbestos exposure under its Fibreboard policies; and counsel for the asbestos claimants advised that they would not negotiate with Continental without Fibreboard's consent. App. 8a-9a, 270a.

Accordingly, the District Judge was hardly the officious interloper described in the petition. To the contrary, before taking a single action with respect to the negotiations that led to the Global Settlement, he had before him a case: (a) asserting the rights of tens of thousands of asbestos claimants to the proceeds of Fibreboard's claimed insurance; (b) whose filing was concededly intended by Fibreboard and the claimants to pressure Continental into seeking an overall resolution of the coverage dispute; and (c) where the defendant, Continental, had informed him that it would be willing to settle only as part of such an overall resolution.

B. The petition misrepresents the District Judge's role in the settlement negotiations.

The petition likewise badly misrepresents the actions the District Judge thereafter took to facilitate settlement. As the Fifth Circuit put it in rejecting the Flanagan Petitioners' similar insinuations below:

> Judge Parker's role in the negotiating process was insubstantial. . . . His actions were limited to appointing Judge Patrick E. Higginbotham of [the Fifth Circuit] as a settlement facilitator, appointing class counsel for the [class] at the recommendation of Judge Higginbotham, receiving regular reports of the negotiations and mediating the global settlement negotiations personally for part of one evening.

App. 55a.

And the petition's description of the events of August 26, 1993 — the "one evening" that Judge Parker was personally involved in the negotiations — is insulting. Pet. 8-10. In particular, the District Judge did not force the parties to settle by, among other things, plying counsel with alcoholic beverages. Pet. 9. Instead, well aware that the California Court of Appeal would hear final argument in the coverage litigation the next day, the parties requested that the District Judge assist them in a "last-ditch effort to reach agreement." App. 12a. The District Judge honored this request, mediating negotiations regarding the parties' remaining differences and providing counsel with a light meal at his home when negotiations extended into the evening after the courthouse closed for the day. App. 12a. As the evidence showed, moreover, when the parties reached the

District Judge's home, they were in fact already in agreement as to financial terms (although that fact was not known by Fibreboard or the insurers), with class counsel engaged in an ultimately successful exercise to extract additional money. App. 293a-294a.*

C. The judiciary did not "script" the Global Settlement.

The Flanagan Petitioners' assertion that several features of the Global Settlement were "scripted" by "an ad hoc 'shadow committee' of federal judges, acting behind-the-scenes to advance some agenda" (Pet. 7) is without merit.

First, there is no record support for the Flanagan Petitioners' allegation that "[t]he judiciary, and not the parties, made the crucial decisions concerning the Rule 23 class action no-opt-out structure of the settlement." Pet. 6. Rather, as the Fifth Circuit observed, all evidence shows that it was *Continental* that insisted upon such a settlement. App. 9a-10a. Indeed, 12 pages later in their own petition, the Flanagan Petitioners affirmatively argue that "[i]t is clear that *Continental's* insistence upon a non-opt-out settlement was the driving force behind the use of Rule 23(b)(1)(B) for a non-opt-out certification." Pet. 18 (emphasis added); *see also id.* (terming Continental "intransigent" on the point).

The few times the Flanagan Petitioners do seek evidentiary support for their charges, they badly distort the record. Thus, Judge Higginbotham's anger at Messrs. Rice and Cox stemmed not from his "faithful[ ] follow[ing] [of] the non-opt-out

* Moreover, while the Flanagan Petitioners complain about the supposed "pressure" the District Judge applied during the negotiations, the only ostensible example they cite is alleged pressure placed on *the insurers* to pay more money (Pet. 9-10): hardly the sort of pressure that *class members* should be upset about.

mandate" (Pet. 6), but from their refusal to comply with his request that — in order to move the negotiations along — they put the reasons for their preference for an opt-out class in writing. App. 278a-279a. Likewise, the District Judge's order appointing counsel to negotiate the prospect of a non-opt-out global settlement (Pet. 8) *postdated* by almost two months the parties' working consensus that a Global Settlement would, indeed, have such a structure. App. 280a-281a.*

Second, the Flanagan Petitioners' portrayal of Judge Higginbotham's ordering the "futures-only" nature of the class on a whim (Pet. 6-7) is based on similar liberties with the facts. As noted above, Judge Higginbotham had been appointed to serve as a mediator in March 1993. In July 1993 — after several months of negotiations towards an all-inclusive class settlement encompassing presents and futures had proven unsuccessful, and with the final appellate argument in the coverage litigation drawing near — he informed the parties that he had come to the view that a combined presents and futures settlement was "too complex," and that the class should instead be limited to "futures," with Continental settling present claims separately.

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* Finally — in light of the fact that the District Judge had on a number of prior occasions publicly set forth his view that, in an appropriate case, the law permitted a non-opt-out settlement to be crafted under Rule 23(b)(1)(B) — it is hardly surprising that Continental's counsel, who was firmly committed to such a course, would have invoked these expressions of opinion during the course of debate. Pet. 5-6. But that is a far cry from the District Judge's having, as the petition insinuates, "mandate[d]" that the parties proceed on that basis. Moreover, Mr. Cox, who attended the March 10, 1993 status conference (of which no transcript was taken) at which the Flanagan Petitioners (who did not attend the conference) contend that the District Judge instructed that a Rule 23(b)(1)(B) class settlement be negotiated, testified that the District Judge said no such thing. *See* JA7:1093 (citations to "JA" refer to portions of the joint appendix in the Fifth Circuit not included in the petitioners' appendix).

App. 282a-283a. The parties each recognized that this recommendation had merit (App. 283a-284a, 374a),* and agreed to it. This was hardly an inappropriate role for a court-appointed mediator to play: as even the dissent below acknowledged, "[c]ertainly there can be no criticism of Judge Higginbotham's role. . . . In facilitating agreement, he did precisely what a mediator is supposed to do." App. 119a n. 52.

Moreover, contrary to the Flanagan Petitioners' insinuations, this recommendation worked to the *advantage* of the class. It allowed class counsel to use negotiations regarding present claims as a benchmark in order ultimately to achieve higher settlement values for the class than would otherwise have been attainable. App. 374a.**

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* Among other things, a class settlement involving presently pending claims would have raised issues under the Anti-Injunction Act, 28 U.S.C. § 2283. It is in no way inappropriate, moreover, that Judge Higginbotham — acting as settlement facilitator — may have discussed these issues with some of his colleagues prior to informing the parties of his views. Pet. 7. Finally, the limitation of the class to "futures" did not somehow insulate the Global Settlement from objection, as the dissent below claimed: (1) though this is a "futures" class, a "future" claimant is defined as any person who had not *filed a claim* against (or settled with) Fibreboard prior to August 27, 1993, and there are thus tens of thousands of class members with currently manifest injuries; and (2) there is a highly organized and motivated plaintiff's asbestos bar, members of which would not have hesitated to object if they thought the Global Settlement were unfair or otherwise inimical to class members' interests.

** The negotiations regarding present claims revolved principally around the massive assignment settlement whose validity Fibreboard had originally filed suit to establish. *See* p. 3, *supra*. Because these negotiations were thus taking place off of inflated "assignment" values, class counsel was in the enviable position of: (a) negotiating an agreement for present claimants off of inflated "assignment" values; and then (b) understandably insisting that they could not possibly accept less for the futures class. App. 374a.

D. The petition misrepresents the fairness hearing proceedings before the District Court.

The Flanagan Petitioners also take out of context the District Judge's comments at the August 27th and September 9th hearings immediately following the reaching of an agreement in principle with respect to a Global Settlement. Pet. 10-12. There is no question that the District Judge's understandable reaction to the parties having at the eleventh hour succeeded in reaching an agreement in principle, resolving a fifteen-year-old coverage dispute and establishing a multi-billion-dollar fund for asbestos claimants, was one of approbation. This is hardly surprising.

But that in no way suggests that the District Judge's mind was closed on the matter: that, as the petition claims, he "failed to recognize that class members have a right to lodge objections to a proposed settlement; [and] that the assigned judge must pass upon those objections before a class settlement may be finalized." Pet. 25. To the contrary, the District Judge's tentative expressions are analytically indistinct from the preliminary approval of a class settlement that is *required* under the Rules in advance of any fairness hearing. *See* Manual of Complex Litigation § 30.44, at 229 ("A two-step process is followed when considering class settlements. First, the court makes a preliminary evaluation of the fairness of the settlement. . . .").

There is *no* evidence that the District Judge had made anything more than the contemplated "preliminary evaluation." To the contrary:

- At the August 27 hearing, class counsel, speaking for all parties, stated quite clearly the parties' understanding that "this deal is completely contingent upon Court approval and the Court's

complete investigation of the deal on all issues that the Court deems appropriate" (JA71:5);

- In granting a preliminary injunction on September 28, 1993, the District Judge explicitly stated that he was not "prejudging the outcome of an application for approval of the settlement based on a fully developed record," and that he would not at that "juncture predict with certainty what actions it will take following a fairness hearing — where all issues and objections can be addressed on a full record" (JA141:7, 12);

- the District Judge thereafter appointed a guardian *ad litem* to make an independent assessment of the Global Settlement from the standpoint of the Class and to advise the Court as to the Settlement's fairness (App. 14a, 398a-399a);

- the District Judge ordered comprehensive notice materials disseminated in what proved to be an $18 million worldwide mail, television and newspaper notice campaign, the most expensive such campaign ever (App. 419a-426a);

- the District Judge stated that he "welcome[d]" intervention motions as helping to "insur[e] that the Court will have a full record with all of the 'pros' and 'cons' relating to the fairness, reasonableness and adequacy of the proposed settlement — to assist the Court in its ultimate decision in this case" (JA112:5-6);

- the District Judge granted intervenors, including the Flanagan Petitioners, extremely broad discovery,

including depositions of the lawyers who negotiated the settlement and production of over 20,000 pages of documents; and

- the District Judge then conducted a comprehensive eight-day fairness hearing, giving the Flanagan Petitioners (and all other intervenors) full cross-examination rights and the broadest latitude to offer evidence and argument.

Finally, even subsequent to the fairness hearing, the District Judge raised an express question as to whether he would approve the Global Settlement unless certain changes were made in the Trust administration rules — changes which were indeed then made by the parties. App. 391a-393a. In sum, there is absolutely nothing in the record that supports the Flanagan Petitioners' charges of bias; indeed, none of the other intervenors have ever raised that claim or sought the District Judge's recusal.

E. The Flanagan Petitioners do not accurately describe the proceedings below regarding their recusal motion.

The petition's one-paragraph description of the procedural history of its recusal motion (Pet. 12-13) omits several pertinent facts. *First*, contrary to the implication in the petition, the District Judge did not himself deny that motion. Rather, he leaned over backwards to refer the motion to *another* District Judge (Judge William M. Steger). Judge Steger found — "[o]n the basis of the entire record" — that "no reasonable person would conclude that Judge Parker is biased and no reasonable person would harbor doubts about his impartiality." *Ahern v. Fibreboard Corp.*, 6:93cv526 (E.D. Tex., Jan. 10, 1994) at 2.* *Second*, the Flanagan

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* Subsequently, when the Flanagan Petitioners renewed their recusal motion at the fairness hearing itself, Judge Parker denied the motion himself.

Petitioners then sought mandamus from the Fifth Circuit, which a panel comprised of Judges Davis, Duhe and Jones denied without opinion. *See In re Tillman*, No. 94-40301 (5th Cir., June 22, 1994).* *Finally*, in the decision below, the Fifth Circuit conducted its own "review of the record"; determined that "Judge Parker's role in the negotiating process was insubstantial"; and "confirm[ed]" Judge Steger's finding that "Judge Parker carefully avoided any appearance of impropriety." App. 55a.

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the courts below abused their discretion in determining that the District Judge's recusal was not required under 28 U.S.C. § 455 does not warrant review by this Court. The decision below was a plainly correct application of settled law, and no conflict among the circuits is even alleged.**

1. In *Liteky v. United States*, 510 U.S. 540 (1994), this Court addressed the legal standard applicable to recusal claims under 28 U.S.C. § 455. The Court held that such claims are subject to the "extrajudicial source doctrine," under which "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at

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* Judge Jones, while joining in the denial, would have left the issue to be "aired on direct appeal." *Id.*

** As noted above, the question raised in the petition regarding the constitutionality of the certification of a non-opt-out class — and the petition's erroneous claim of a circuit conflict regarding that question — is addressed in respondents Continental's and Pacific's brief in opposition in *Ortiz v. Fibreboard Corp.*, No. 96-1394.

555. Likewise, under that doctrine, a "judge's view of the law" derived from sources such as scholarly reading does not suffice as a basis for "bias or prejudice" recusal. *Id.* at 554. Applying this standard, the court below determined that recusal was not warranted. App. 54a-55a.

2. Although the petition omits mention of *Liteky*, its crux is a factbound claim that the court below misapplied the *Liteky* standard. It alleges no confusion or conflict in the lower courts about *Liteky's* meaning or how it is to be applied. There is thus no cause for this Court's review.

In addition, the decision below was a plainly correct application of *Liteky*. The Flanagan Petitioners principally allege that the District Judge was biased as a result of his participation in settlement negotiations; however, since such activity is clearly a proper judicial function — and is not "extrajudicial" in nature — that participation could supply grounds for recusal only if "opinions formed" by the District Judge in the course of it "display[ed] a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555. And when the actual underlying facts about the District Judge's "insubstantial" role in the negotiations (App. 55a) — rather than the petition's colorful, but inaccurate, description of them — are considered, it is clear that the District Judge "display[ed]" no such thing. To the contrary, as the Fifth Circuit determined, he "carefully avoided any appearance of impropriety." App. 55a.

Indeed, the lower courts have regularly recognized the propriety of a judge's participation in settlement negotiations, and have regularly voiced approval of far more extensive participation than the District Judge's here. *See, e.g., Ackerman v. Kassar*, 5 F.3d 534 (table), 1993 WL 326453, *2-*4 (9th Cir. Aug. 26, 1993); *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 733 (2d Cir. 1992); *Wheeler v. Southland Corp.*, 875

F.2d 1246, 1251-52 (6th Cir. 1989); *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986); *Geneva Assurance Syndicate Inc. v. Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566, at *3-*4 (N.D. Ill. Sept. 28, 1993); *United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 234 (W.D. Mo. 1985); *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 9[illegible]-26 (D. Nev. 1983).

Moreover, the Flanagan Petitioners' claims are likewise meritless to the extent they are based on: (a) the District Judge's prior statements of his view that, in an appropriate case, the law permitted a non-opt-out settlement to be crafted under Rule 23(b)(1)(B); and (b) his provision of his home to the parties as an informal venue for further negotiations when the courthouse was to close on the night before the final argument in the coverage litigation. The former represent only the "judge's view of the law" (*Liteky*, 510 U.S. at 555); the latter is hardly a basis for the judge's disqualification. *See In re Beard*, 811 F.2d 818, 828-29 (4th Cir. 1987) (judge's invitation to president of product liability defendant to meet at judge's home to discuss whether defendant planned to file for bankruptcy was not improper).

3. Nor is there any cause for this Court to address the Flanagan Petitioners' novel and completely unsupported argument for "an automatic *per se* rule of recusal" in class proceedings whenever the judge has any involvement whatever in settlement negotiations. Pet. 20. The petition cites no authority that even remotely supports this position, nor does it explain why such a draconian rule is needed. Indeed, it principally relies on 28 U.S.C. § 455 — which, as set forth above, this Court construed in *Liteky not* to state any such "automatic *per se* rule of recusal."

Instead, all authorities reject the Flanagan Petitioners' "*per*

se rule," recognizing the useful and often necessary role that judges can play in the settlement process. *See Ackerman*, 5 F.3d 534 (table), 1993 WL 326453 at *3-*4; *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 733 (2d Cir. 1992); *In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1543 (11th Cir. 1987); *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 481 (E.D.N.Y. 1993); *In re Fernald Litig.*, 1989 WL 267039, at *1 (S.D. Ohio. Sept. 29, 1989); *see also United Founders Life Ins. Co. v. Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 655 (7th Cir. 1971) ("The soundness of the district court's conclusion of approval or disapproval may also be determined by a consideration of the court's knowledge of the case drawn from pre-trial conferences . . ."); Manual for Complex Litigation §§ 23.11, 30.44 (recognizing that a judge may participate in class action settlement negotiations even though the judge will ultimately have to pass on the settlement's fairness). As the Second Circuit stated:

> A judge with responsibilities for a lawsuit is not a bystander. Nor is the judge relegated to the role of umpire, awaiting the submission of precisely framed disputes by the parties. Especially in the course of a complex and continuing proceeding such as a bankruptcy reorganization, a judge has an entirely legitimate judicial role in suggesting constructive solutions and assisting the parties in achieving them.

In re Joint E. & S. Dist. Asbestos Litig., 982 F.2d at 733.* The

* *See also In re Dennis Greenman*, 829 F.2d at 1543 (appellate court can draw comfort from fact that court that passed on settlement's fairness "itself participated in the settlement process"); Fed. R. Civ. P. 16(a)(5) (expressly authorizing the judge to take actions "facilitating the settlement of the case"); *Fong v. American Airlines*, 431 F. Supp. 1334, 1339 (N.D. Cal. 1977) (judicial involvement in settlement process is an "absolute necessity in the federal judicial system").

Flanagan Petitioners are thus challenging settled law and sound policy, and their effort to do so does not call for this Court's review.

CONCLUSION

For the reasons given above, and for those given in respondents Continental's and Pacific's brief in opposition in *Ortiz v. Fibreboard Corp.*, No. 96-1394, the petition should be denied.

Dated: March 31, 1997

Respectfully submitted,

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No. 96-1379

In The
Supreme Court of the United States

October Term, 1996

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF
OF FLANAGAN AND MIDDLETON

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REPLY BRIEF OF FLANAGAN AND MIDDLETON

I. PREFACE

The brief filed by the Proponents of this non-opt-out class action settlement employs a strategy not unprecedented in human history, but surprising nonetheless: *"IT NEVER HAPPENED!"* There are those who still claim that the Holocaust never occurred; a few flat-Earth enthusiasts still believe — with apparent sincerity — that humankind has not yet reached the Moon.

The Proponents of the Global Settlement accuse these Petitioners of "misrepresent[ing]" a laundry-list of matters: "how this case came before the District Court"; the extent of Judge Parker's "role in the settlement negotiations"; "the fairness hearing proceedings before the District Court"; and "the proceedings below regarding their recusal motion." The Proponents claim, without citation to the record that "The judiciary did not 'script' the Global Settlement."

A reply brief is not the occasion for repeating the contents of the initial petition, but at this juncture Petitioners simply note their citations to the record set forth in their Petition and state simply, "The Court . . . cannot make the record what it is not." *Missouri* v. *Jenkins*, 495 U.S. 33, 49 (1990). ***IT DID HAPPEN!*** The real questions raised by the judicial midwifery involved in the birth of this unprecedented non-opt-out class action are: (1) Whether the trial judge's entanglement precludes the trial judge from passing upon the settlement's fairness; (2) Whether the dangers of such judicial involvement in class-action settlement dictate a bright-line rule mandating that such a settlement be committed to another jurist for scrutiny of its legality and fairness under Fed. R. Civ. P. 23(e).

II. THE *LITEKY* DECISION DOES NOT ADDRESS THE CONCERNS RAISED BY JUDICIAL INVOLVEMENT IN THE CRAFTING OF A CLASS ACTION SETTLEMENT.

Liteky v. *United States*, 510 U.S. 540 (1994), heavily relied upon by the Respondents, does not address the problems

peculiar to class actions and the judicial intervention in the settlement thereof. As stated in the first paragraph of that decision, the issue before this Court in *Liteky* was "whether required recusal under this provision[1] is subject to the limitation that has come to be known as the "extrajudicial source" doctrine." 510 U.S. at 541.

As Justice Scalia wrote:

> It seems to us that the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope . . . is simply the pejorative connotation of the words "bias or prejudice." . . . The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree . . .

510 U.S. at 550 (emphasis in the original.) "[T]he pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable." 510 U.S. at 552.

What is "normal" or "acceptable" in the context of a simple, two-party lawsuit with all parties present (whether in open court, a judge's chambers, or a judge's home) is not the measure of what is acceptable in a non-opt-out class action suit. As set out in the original Petition, and in the dissenting opinion filed in the Court below, Judge Parker's expressions of opinion in favor of the Global Settlement — necessarily being against opponents of that settlement — are indeed "excessive in degree" and "go beyond what is acceptable" in a class action case affecting the rights of thousands of absent individuals.

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1 **Referring to 28 U.S.C. § 455(a), which provides for disqualification in "any proceeding in which . . . impartiality might reasonably be questioned."**

III. THE RESPONDENTS' AUTHORITIES DO NOT SUPPORT THEIR POSITION.

The Respondents ignore entirely the cases and other authorities cited by the Petitioners in their Petition. The authorities they do cite do not support their position that the law finds appropriate judicial participation in settlement negotiations "far more extensive" than Judge Parker's in this case.

In re Fernald Litigation, 1989 WL 267039 (S.D. Ohio 1989), provides no support to the Respondents. Indeed, in a later published opinion arising out of the same litigation, the *Fernald* judge, the Honorable S. Arthur Spiegel, ordered a class-action settlement assigned to another judge to conduct the Rule 23(e) fairness hearing. *Day* v. *NLO*, 864 FSupp. 40 (S.D. Ohio 1994).

The facts of that case mirror those of the case at hand. Judge Spiegel noted that the proposed class settlement had been reached after the parties had engaged in week-long "full time settlement negotiations, under the direct supervision of the Court." 864 FSupp. at 41. Noting the necessity for a hearing to review the fairness of that settlement, Judge Spiegel wrote:

> Because of this Court's active and extensive participation in the settlement negotiations, out of an abundance of caution, we find that this fairness hearing should be conducted by one with some greater distance from the struggles that lead to the proposed settlement.

Id. In further support of the reassignment, the court stated:

> In the case at bar, this Court has taken an especially active and affirmative role in settlement negotiations. Some would argue that it would be highly unlikely that a judge who takes this sort of aggressive role would ever fail to find the settlement to be fair, adequate, and reasonable. In other words, it is hard to believe that he could maintain his ability to be the disinterested appraiser en-

> visioned in Federal Rule of Civil Procedure 23(e). Others maintain that the judge, in passing on the fairness of the settlement, may overlook the interest of the absent class members. One can agree that if the Court makes suggestions to be included in the settlement, it can put itself in the position of having such an investment in the settlement that it will be difficult for the judge to objectively determine whether the settlement is fair.

Moreover, even if the trial judge in such a situation should be totally impartial within his or her own mind, the problem of appearances to class members distant in space — and possibly, time — remains.

The Global Settlement at issue herein purports to bar asbestotic claims of persons who have no inkling that they have been exposed to Fibreboard's toxic asbestos products. The Settling Parties hope that the fund established by the settlement will be large enough to pay the future claims, but no one really knows. It is useful to consider the very real possibility that, say thirty years hence, an individual suffering a deadly asbestotic cancer presents a claim under the Global Settlement, only to be advised that the Settlement Fund is "broke". To such a hapless individual, the claim that the federal judge in whose kitchen the settlement was wrought was really totally impartial in passing upon the settlement will "ring hollow", indeed. Simply put, *appearances matter. Liteky*, 510 U.S. at 548 (§ 455(a) requires claims of judicial bias to be evaluated "on an *objective* basis so that what matters is not the reality of bias or prejudice but its appearance.") (Emphasis in the original.)

Respondents trot out one of their favorite quotes from the Johns-Manville Litigation [*In re Joint E. & So. Dist. Asbestos Litigation*, 982 F.2d 721, 733 (2d Cir. 1992)], to the effect that "a judge . . . is not a bystander". The Second Circuit goes on to note that although it may be appropriate for a trial judge to assist in "suggesting constructive solutions and assisting the parties in achieving them",

> Of course, there are limits to the exercise of that role. There is a line to be observed between suggesting the resolution of a dispute and insisting upon it. All who have exercised judicial authority are aware that, unless a judge acts with caution and sensitivity, there is a risk that what the judge tenders as a suggestion will be perceived as a command.

Most of Respondents' authorities are inapposite in that they are not class action matters in which — by definition — there are large numbers of litigants not "at the table" either personally or by counsel. *See, e.g., Wheeler* v. *Southland Corp.*, 875 F.2d 1246, 1251-52 (6th Cir. 1989); *Franks* v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986); *Geneva Assurance Syndicate Inc.* v. *Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566 (N.D. Ill. 1993).

Ackerman v. *Kassar*, 1993 WL 326453 (9th Cir. 1993), to the extent it has any precedential value, does not hold that a jurist involved in settlement negotiations may sit at a Rule 23(e) fairness hearing *over objection* — there was no such objection interposed in that case.

Franks v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986), a non-class-action, involved a motion to recuse, filed more than a year after events — at which the party had been present and registered no objection — occurred. Likewise, in the unpublished decision in *Geneva Assurance Syndicate Inc.* v. *Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566 (N.D. Ill. 1993), a non-class-action, a party which had been at the proverbial table throughout the settlement process registered no contemporaneous objection to judicial involvement.

IV. CONCLUSION

The Respondents cite the case of *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987), for the proposition that judicial participation in settlement is a wonderful thing. The citation to *Greenman* is ironic, for that decision says far more in favor of these Petitioners'

position; indeed, the court in that case reversed the approval of a class-action settlement, stating as it did so:

> We certainly empathize with the district court's desire to bring this case to a just and not untimely end. However, the court took a road not well traveled. In so doing, it ignored Justice Jackson's admonition that "the mere fact that a path is a beaten one is a persuasive reason for following it." Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Col. L.Rev. 1, 26 (1945). While the Congress might well consider forging additional courses to facilitate the expeditious and equitable management of complex cases such as this one, Rule 23, as written, does not support the district court's action.

829 F.2d at 1546.

These Petitioners pray that the Court grant certiorari, overturn the erroneous decisions rendered in the courts below, and safeguard both the appearance and the reality of justice in the approval of class action settlements in the courts of this nation.

Respectfully submitted,

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